

The background of the cover is a close-up of a woman's face, partially obscured by vertical glass panes that resemble prison bars. The panes are covered in water droplets and streaks, creating a sense of barrier and emotional weight. The lighting is dramatic, with the woman's eyes and part of her face visible through the glass.

# **RAPE MYTHS AS BARRIERS TO FAIR TRIAL PROCESS**

Comparing adult rape trials with those  
in the Aotearoa Sexual Violence Court Pilot

**ELISABETH MCDONALD**





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in the Aotearoa Sexual Violence Court Pilot

**ELISABETH MCDONALD**

**WITH PAULETTE BENTON-GREIG, SANDRA DICKSON & RACHEL SOUNESS**

CANTERBURY UNIVERSITY PRESS



*To all those who have experienced sexual violence  
and those who walk beside them*

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## FOREWORD

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We, who have long researched, campaigned and worked in the area of rape law reform, continue to hope for improvement in how the criminal justice system deals with rape complainants. Over the past 30 years there has been significant progressive reform to the substantive, procedural and evidential rules governing rape trials in Aotearoa New Zealand, the jurisdiction out of which this study emerges (as well as in our “home” jurisdictions, Australia and the United Kingdom). It is sobering, therefore, that the pages of this book often reflect the brutal, reform-resistant nature of rape trials, particularly in relation to the questioning of complainants. If the book was simply a (further) study of the failure of progressive law reform, it would be important, albeit profoundly depressing. Thankfully, for those of us who refuse to abandon the pursuit of reliable and improved justice in rape cases, the work of Elisabeth and her research team offers much more.

The book provides unique insights into current Aotearoa New Zealand trial processes in adult acquaintance rape cases where the central issue is a dispute over consent. It examines 30 matters prosecuted over a five-year period (January 2010–September 2015) (the principal study), as well as 10 rape trials from the Sexual Violence Court Pilot (November 2017–November 2018).

Because the studies analysed trial transcripts and audio files from complainant testimony we have a “window” into the trial process like none before. Indeed, not since the Heroines of Fortitude study, conducted in New South Wales, Australia, over 20 years ago (1996), has a research project had such access to the audio recordings of complainant testimony. It is testament to the longstanding relationships Elisabeth has with members of the judiciary in Aotearoa New Zealand, the high regard in which she is held by the profession and the trust placed in her, that access was granted to these highly confidential audio files. This trust has been well placed.

In a jurisdiction such as Aotearoa New Zealand, where the court room is closed to observers when rape complainants give their testimony, examination of the audio recordings has allowed crucial and timely scrutiny of current trial procedures, and the ways in which they may be experienced. This has enabled the researchers to sensitively and accurately capture the type and content of questions that cause the most distress to complainants (typically during cross-examination). These include: challenges to memory and inconsistencies based on a failure to recall peripheral details of the event; accusations of lying about the events; questions about complainants’ behaviour; questions that rely heavily on rape myths; and questions that suggest the complainants were responsible for what occurred. The studies found that while judicial intervention or Crown objection was made to the “form” of some questions (usually

around issues of clarity or fairness), disappointingly, there was little intervention to stop what Elisabeth refers to in Chapter Eight as “improper” questions — those designed to humiliate complainants or to elicit irrelevant information. Here, complainants were largely left to fend for themselves.

The analysis of trial transcripts also confirmed ongoing problems with the operation of “rape shield” evidentiary provisions. The study finds that sexual experience evidence is frequently admitted without the application of heightened evidence tests (such as section 44 of the Evidence Act 2006 (NZ)). Evidence falling outside the scope of section 44 — such as sexual experience evidence of the complainant with the defendant — was often not even subjected to first principles consideration of relevance. The illustrated consequences of the failure to mobilise protective evidence rules are striking and troubling, with complainants asked about matters such as flirting with others on the night of the alleged rape; “uninhibited dancing” earlier in the night; possession of sex toys; contraception methods; pregnancies and numbers of children. Such evidence undermines the credibility of complainants but also plays to rape myths that consent or behaviour in one context is transferrable to the alleged events.

As researchers who have been working on sexual assault law reform for a long time, it was confronting (and frustrating) for us to see such clear evidence of the relative ease with which legal rules designed to enhance complainants’ welfare can be circumvented or neutralised.

While the study provides insights into such areas (which are known to be problematic), it also highlights less well-known problems with the trial process — including practices which are the antithesis of a complainant welfare-oriented approach. In numerous trials, unnecessary distress was caused to complainants who were required to explain social media platforms to judicial officers and lawyers, for whom such 21st-century technologies are, apparently, foreign. It seems indefensible that it should fall to complainants in rape trials to explain how Facebook works, the meaning of Messenger or abbreviations (often containing obscenities), or the significance of an emoji or emoticon. Complainants not only evidently struggled to do so, but also, as described in Chapter Four, found that the effect was often to position their social world as “abnormal, suspect or laughable”. Not only is this distressing for complainants, it also may undermine their credibility.

The book documents other trial practices that also cause unnecessary distress for complainants such as: being confronted (without warning) with exhibits, including photos of the location where the rape took place; or being questioned about (and having to navigate) text message schedules with a high volume of messages, multiple columns and numerical data. Worse still were questions which required complainants to know and use “correct” terms for genitalia and sex acts, which they were not necessarily familiar with or comfortable using.

As we noted at the outset of this Foreword, one of the really important features of this book is that it does not simply document ongoing problems with complainants’ experiences in rape trials (as important as this is). Consistent with Elisabeth’s intention in undertaking this research

(to imagine how the adversarial process could be different), the detailed empirical work at the heart of her study has allowed her to make very practical reform recommendations to the whole “life cycle” of the trial, including: pre-trial matters; trial process; closings, summings-up and jury directions; evidential and procedural law reform; substantive law reform and education and development programmes.

Some of these recommendations may look “small”, or even common sense — such as developing models of judicial communication with complainants based on courtesy, using their names, and providing explanations, expressions of thanks or appreciation for giving evidence — but they are much more important than that. They are eminently feasible and they have real potential to alleviate complainants’ distress, by enabling them to be less ill at ease in the foreign environment of the courtroom. Such common courtesies would also appropriately acknowledge and show appreciation of the important civic duty they are performing: giving evidence in a serious crime trial.

Other practical recommendations address aspects of trials that repeatedly caused distress to the complainants. One of these is the suggested use of agreed statements of fact, where penetration is not in issue, so that complainants are not required to give detailed evidence about genitalia and sexual acts. Other recommendations go to the broader investigative context, such as the need for a protocol around gathering and using sensitive and confidential information about the complainant. Further recommendations are designed to spark a culture shift, and to “capacity-build” through training towards improved management of the courtroom environment — they include ongoing education programmes for judges and counsel incorporating training specific to sexual violence matters, such as modelling of cross-examination techniques to reduce reliance on repetition, and enhanced understandings of social media. These suggestions are practical, important and far-reaching in their potential to make a real difference to the experience of complainants in rape trials, and also, over time, to influence public perceptions of the courtroom in a way that may make all victims of sexual violence less reluctant to report rape and participate in criminal proceedings.

In developing the recommendations, Elisabeth has had the benefit of the insights from two full-day workshops (in Auckland and Wellington) which she organised and we were fortunate to be able to attend. In these workshops Elisabeth brought together a broad range of stakeholders, including victim advocacy organisations, prosecutors, defence counsel and academics — their attendance and participation is again testament to the high regard in which Elisabeth is held by both the profession and academia. We were impressed by the depth and respectful nature of the workshop discussions, and the openness and generosity with which stakeholders shared their expertise. The impact of the book’s analysis and proposals is strengthened in important ways by this engagement, and it is a credit to Elisabeth that she embraced these discussions as an integral component of the project’s design.

This book is detailed in its analysis, rich in its insights and far-reaching in its implications. It should be read by anyone involved in, or concerned about, the handling of sexual violence allegations in contemporary criminal justice systems, in and beyond Aotearoa New Zealand — whether as a judicial officer, legal practitioner, government policy officer or academic. Finally, the enormous physically and emotionally draining work that Elisabeth has undertaken to bring this project to fruition should be acknowledged: drafting the multiple grants that allowed for the funding of the project together with the ethics applications to access the trial transcripts and audio files; visiting and liaising with all of the courts and Heads of Bench to ensure the project progressed in a manner that was mutually and ethically consistent with the project and the duties of the court to protect the integrity of the judicial process and complainant confidentiality in particular; and leading a team of excellent researchers to bring this book to a close. Elisabeth's expertise in the areas of evidence and procedure has allowed her to draw together the multi-faceted insights from the project in a way that is not only illuminating for scholars but also accessible to practitioners, sector workers and policy makers alike. Elisabeth's work is absolutely essential if we are to improve the experience of complainants in rape trials — and to make a dent in the “brutal old days” that are, unfortunately, still with us.

Julia Quilter

Vanessa E Munro

December 2019



## CONTRIBUTORS

**Elisabeth McDonald** MNZM, BA LLB (Well), LLM (Mich)

Elisabeth is a Professor of Law at the University of Canterbury. She has taught and published in the areas of sexual and family violence, law and sexuality, criminal law and the law of evidence for 30 years, as an academic and as the Policy Manager for the evidence law reference at the New Zealand Law Commission. Elisabeth is the author of a number of evidence law textbooks and online legal resources, as well as co-editor of *From “Real Rape” to Real Justice* (2011) and *Feminist Judgments Aotearoa: Te Rino, the Two-Stranded Rope* (2017).

**Paulette Benton-Greig** BA LLB (Otago), MA (Hons) (Auck)

Paulette is a lecturer at Te Piringa-Faculty of Law, University of Waikato, where she teaches in the areas of criminal justice and procedure, and in socio-legal studies topics. Prior to her academic position, Paulette worked in social services provision and policy, mainly in the area of violence against women. Those various roles included being a manager at Auckland Sexual Abuse HELP, a board member of a sexual violence restorative justice organisation, contributing to the Taskforce for Action on Sexual Violence and as a senior advocate at the Domestic Violence Centre.

**Sandra Dickson** BA (OU), BSc, MNZS (Well)

Sandra has been working in gendered violence prevention and intervention responses for more than two decades, including holding national roles in both the family and sexual violence sectors in Aotearoa New Zealand. Sandra moved into government briefly to develop responses to the “Roastbusters” sexual violence events in 2013. During the last 15 years, she has led research into trafficking in the sex industry in London, and sexual violence primary prevention, media reporting of sexual violence, partner and sexual violence in Rainbow communities and attitudes towards gender roles and diversity in Aotearoa New Zealand.

**Rachel Souness** BA LLB (Hons) (Otago)

Rachel has a broad background in legal roles, including reform-orientated research work in both civil and criminal contexts. Rachel worked as a researcher on the Law Foundation-funded project undertaken by Jeremy Finn, Elisabeth McDonald and Yvette Tinsley, which culminated in the publication of *From “Real Rape” to Real Justice* (2011). She has worked in both courts and tribunals, and has volunteered as a community panel member for restorative justice. Most recently, she has spent the majority of her time outside the paid workforce, caring for the next generation of feminists.

## PREFACE AND ACKNOWLEDGEMENTS

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In beginning this research, before even agreeing to submit a grant application, I was determined that it would not just amount to yet another demonstration of how the criminal justice system does not do right by rape victims. Rather, it might demonstrate how the adversarial trial process could be different, could provide fair trial process for both complainants *and* defendants, and not continue to be one of the reasons for the extraordinarily high attrition rates. The plan was to show at which points, while giving evidence, complainants are adversely impacted by the content, nature and tone of questions – and to propose ways by which such impact could be avoided.

As I reflect on the four years of work that has led me here, to be writing this preface, I know now that it was never going to be that simple. The tensions between competing interests and across different roles in this historical, lumbering and slow-to-change exercise in resolving allegations of harm are deeply embedded, culturally supported and closely held. The boundaries that limit judicial intervention and control both protect and prevent what might be viewed as fair process – depending on perspective and desire. While we may not wish the role of rape complainant on anyone we love, at the same time nor do we want anything less than a robust defence to be available for a family member accused of a serious crime. While we ask for a trauma-informed criminal justice process, we know that many defendants do not come to the courtroom free of a difficult past and may be facing an unfamiliar place, unfamiliar language and unfamiliar rules and customs. In the end, and bearing in mind that increasingly we know more about the nature of human trauma, memory, observation, recovery, decision-making, bias and communication, it just might be that the adversarial criminal trial is not, nor has ever been, the best way of determining truth and providing resolution.

While the ponderings for change that emerge from this research may not deliver fair trial process for rape complainants within the confines of the current model, even if they are adopted or accepted, opening the door on rape trials has, at the least, provided a more informed place from which to imagine change. Real change may well only occur through a significant deconstructing of systems – not just by the introduction of jury directions that reflect contemporary social science research and an increased commitment to the consistent application of existing law.

This has been a challenging exercise. I hope it is one that appropriately pays tribute to the lives of the women complainants whose words and experiences we have written about. While the research was focussed on reducing the trauma involved in giving evidence in a rape trial, access to these cases also demonstrated the level of concern, commitment and relentless personal strength required by all participants in the trial process. While some of the

interactions recounted in this book reveal that lawyers' or judges' practices are not what we hoped they would be, there is no doubt that these professionals are performing a necessary public service that many would shy away from. There is no need, in my view, for criticism of individuals, rather, this is a time for aiming for systemic and structural change based on a shared willingness and desire to do things differently, and better. I believe that willingness exists.

The challenges of this work would have been insurmountable without the support, assistance and encouragement of many. This research would simply not have been possible without the long-term financial support from the Marsden Fund Council from Government funding, managed by the Royal Society Te Apārangi (2015–2018) and the University of Canterbury Te Whare Wānanga o Waitaha (2017–2019). The grants from the New Zealand Law Foundation allowed the completion of Sexual Violence Court Pilot comparator research, and, along with the Borrin Foundation, the holding of the two consultative workshops in August 2019. My particular thanks to the Research Committee of the School of Law and the financial and administrative teams (especially Liz Sawyer and Fiona Saunders).

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Early during the process of the case access requests, Paulette Benton-Greig was contracted as the senior researcher for the principal study: a perfect match given her long-standing contributions to the development of policy and practice aimed at supporting victims of sexual violence. Paulette's work setting up a database and maintaining the security of the case material, developing and applying the coding process, and managing the workarounds in NVivo to make the programme fit for purpose provided the essential backbone for this research. She listened to and annotated all the audio from the 30 cases in the principal study, which was a harrowing task. After her appointment to Te Piringa Faculty of Law at the University of Waikato Te Whare Wānanga o Waikato, Paulette remained involved by overseeing the management of the comparative material from the Pilot and sharing her skill set and expertise with the two other independent researchers, and guiding their tasks. Paulette also assisted with various aspects of the analytic material contained in this book, including as contributing author of Chapters Two and Four. She also recorded the discussions from the two workshops, drafted the case summaries and provided comment on aspects of the draft material. Importantly she brought to the work invaluable interdisciplinary knowledge and perspective. Paulette thanks her partner, friends and family for their support and encouragement.

Sandra Dickson joined the research team at the start of the work comparing the cases from the Sexual Violence Court Pilot. With a wealth of experience in the wider sector and lengthy research history in the communities impacted by sexual violence, Sandra seamlessly adjusted to the rhythm of the tasks of the projects. Sandra kept the databases up to date, and annotated and coded the transcripts from the 10 Pilot cases and completed work on aspects of the principal study. She brought her much welcomed sociologically rather than legally trained thinking to the work and to our team meetings, as well as extraordinarily healthy lunches. Sandra is grateful her home life in Wellington allows her to participate in research into such difficult, complex and challenging areas – and, in particular, that her partner Bex and their son Michael are generous, kind and make her laugh frequently over card games, sci-fi and cricket.

I got to know Rachel Souness as our talented and capable researcher, and co-author, on the Law Foundation-funded project (with Jeremy Finn and Yvette Tinsley) which culminated in the publication of *From "Real Rape" to Real Justice* (VUP, 2011). Given her sound understanding of the wider criminal justice context, as well as knowledge of the sexual violence area, and her reform-oriented and sharp legal mind, she was an obvious choice to undertake the final pieces of coding and analysis of the closings and summings-up in both studies. Rachel also provided much-needed research and writing support for the preparation of conference papers and took the lead in scoping and writing up Chapter Nine. Rachel is grateful to live in an age where she can work remotely and at times that fit around her

family's needs. She would like to thank Ben for his unflagging dedication to her work and for listening to her vent, her parents and mother-in-law for hours of unpaid childcare and numerous nourishing meals, and her "A team".

These three team players gave much of themselves, and sacrificed the quality of their home lives, during the course of undertaking this research and putting this book together. This was only achievable with the quality contributions of this particular combination of talents. Thank you all.

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David Stevens, Dr Yvette Russell, Professor Nicola Gavey, Professor Rosemary Hunter and Justice Helen Cull. Special mention must go to Andrea Ewing, who was a tireless, focussed and very wise commentator on many of the chapters.

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**Elisabeth McDonald**

21 November 2019

Happy birthday GCMB

NOTE TO THE READER

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*In order to open the courtroom door on rape trials,  
we have not edited the words actually used,  
nor failed to record what we heard.*

*Even for long-term researchers, this was unexpectedly tough going.*



## CHAPTER ONE

## A RESEARCH RESPONSE TO REFORM-RESISTANT QUESTIONING PROCESS IN ADULT RAPE CASES

*Even if being a victim of rape did not have negative social consequences, reporting and aiding the prosecution of a crime is unpleasant in the best of circumstances. We should not and cannot force women to prosecute, although we can encourage women to speak, thank the women who courageously do prosecute, and do everything in our power to support women who are raped. Finally, we must continue our efforts to make the experience less traumatic by working to eliminate the male innocence and female guilt story in law and society (1992).<sup>1</sup>*

*Given its individualized and reactive rather than proactive character, the criminal justice process will never be a sufficient response to the social problem of sexual harm. Similarly, unavoidable aspects of a criminal trial make it likely that testifying as a sexual assault complainant will always be difficult for many survivors of sexual violence. However, neither of these factors makes it any less important to take whatever steps reasonably possible to make the legal process more humane (2016).<sup>2</sup>*

### *The aims of the principal research project*

These two statements, made 24 years apart, both conclude with a call for changes to trial process to make the experience of giving evidence as a complainant in a rape case less traumatic. While both these authors were writing about the impact of the trial process in other jurisdictions, the calls for change have been no less compelling and no less repetitive in Aotearoa New Zealand.

By December 2011, for example, a range of academic and policy work undertaken in the wake of public concern at the handling of the complaints made about police behaviour in the

1 Lynne Henderson “Rape and Responsibility” (1992) 11 Law and Philosophy 127 at 177.

2 Elaine Craig “The Inhospitable Court” (2016) 66 University of Toronto Law Journal 197 at 200.

mid-1980s had been completed.<sup>3</sup> While the Law Commission was still four years away from finalising its advice to Government,<sup>4</sup> it was nevertheless clear at that time that, despite more than 30 years of law reform, adult rape complainants continued to describe their experiences of giving evidence in virtually identical terms:<sup>5</sup>

*Just having to get up there and tell a room full of people in detail about what happened. ... It's not a nice thing to have to talk about – being forced to have sex in front of a whole lot of people. I thought I was going to be killed when I was raped. If I had, I would have been spared this – it was worse than the rape itself. If that's justice, I'd never report another rape (1983).*

*It was horrible. I was exhausted; like every part of my body that night was so sore. And it was embarrassing and kind of degrading and disgusting and I felt kind of like I was the one on trial because you know the things they ask you and the things they imply and you're in a room full of people, 90 per cent of whom I don't know talking about intimate sexual stuff. Ninety per cent of them are men, you know – most of them were men (2009).*

During the course of this research, more information became available about the experiences of 37 complainants in sexual cases who had been to court during 2015–2018.<sup>6</sup> Similar reactions at the conclusion of the criminal justice process were reported to the interviewers:<sup>7</sup>

*If anyone ever came to me and said, "this has happened to me, what should I do?" I would never recommend that they go through with a prosecution. I wouldn't recommend it for anybody to be honest. Honestly, I would probably tell them to see a psychologist over a Policeman ...*

*There's been no benefit to speaking up, and if it happened to me again I would just get on with my life. If it hadn't of been for this process, then I would have*

3 Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington 2009); Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011); New Zealand Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008); Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating the Views of Te Ohaakii a Hine – National Network of Ending Sexual Violence Together* (Ministry of Justice, Wellington, 2009).

4 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

5 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 33.

6 Four complainants were under 16 at the time of first interactions with the criminal justice process.

7 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 20.



*probably had a wee bit of time off work just to get over the stress and that's it. But I've actually never gone back to work since that happened. My health has hugely suffered and not because of the assault, but because of the process.*

The researchers concluded, in relation to cross-examination:<sup>8</sup>

*Being cross-examined by defence lawyers was almost unanimously described as one of the most difficult aspects of the justice process, with many saying that they were completely unprepared for how traumatic this process was. This aspect ... appeared to be a key point of revictimisation for many participants.*

The impetus for the principal research project<sup>9</sup> was therefore the acknowledgment that the most reform-resistant part of a rape complaint process is the questioning process at trial – in particular, but not exclusively, cross-examination. The many reforms to the rules of evidence and procedure over many years have not resulted in significant change to the experience of rape complainants.<sup>10</sup> As Elaine Craig has recently stated, with regard to Canadian trial process: “Progressive law reforms have not succeeded in preventing criminal defence practices that unfairly and unjustly traumatise sexual assault complainants.”<sup>11</sup> As acknowledged in 2015 by the Law Commission, current public understandings about the nature of the trial process contribute to the low reporting and attrition rate:<sup>12</sup>

*In summary, the research establishes that there are many reasons why people choose not to deal with acts of sexual violence in the criminal justice system, and many of them are directly attributable to the functioning of the trial process and the limited outcomes it delivers. It seems that victims do not report because they perceive (often accurately) that the criminal trial process will not serve them and their interests well. They may feel that they will not be believed and that the ordeal of giving evidence is not worth the perceived low likelihood of a guilty verdict.*

8 At 79.

9 Supported by the Marsden Fund Council from Government funding, managed by Royal Society Te Apārangi (2015–2018) and the University of Canterbury Te Whare Wānanga o Waitaha (2017–2019).

10 Julia Quilter “Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform” (2011) 35 Australian Feminist Law Journal 23; Clare McGlynn “Feminist activism and rape law reform in England and Wales: A Sisyphean struggle?” in Clare McGlynn and Vanessa E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) at 139; Jessica Kennedy and Patricia Eastaie “Shades of Grey: Indeterminacy and Sexual Assault Law Reform” (2011) 13 Flinders Law Journal 49; Wendy Larcombe “Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law” (2011) 19 Feminist Legal Studies 27; Sharon Cowan “Sense and Sensibilities: A Feminist Critique of Legal Interventions against Sexual Violence” (2019) 23 Edinburgh Law Review 22. Tanya Serisier demonstrates that how women talk about their experience of rape, including the stigma associated with being a victim/survivor, has also not changed in 50 years: *Speaking Out: Feminism, Rape and Narrative Politics* (Palgrave Macmillan, 2018) at 12.

11 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018) at 52.

12 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.31] and further in Chapter Two at 17.

While the adversarial trial process is not relied on by the vast majority of those who are victims or survivors of sexual violence,<sup>13</sup> we believe that the negative impact of participation in that process for those who choose to engage with it must be lessened. Governments must focus on “tak[ing] whatever steps [are] reasonably possible to make the legal process more humane”.<sup>14</sup>

Those complainants who report the most distress are those who allege they were raped by someone they know – sometimes called “acquaintance rape” – and the issue at trial is consent or belief in consent.<sup>15</sup> The issues in those trials have historically permitted questions that are based on rape myths, or a “real rape” schema (see Chapter Three). One of the aims of the principal research was to assess the extent to which reliance on, and reinforcement of, those myths impact on complainant experience.<sup>16</sup> In this sense, this research responds to the stated need for the analysis of “a large and broadly representative sample of acquittal and conviction cases,” in order to document the effects of law reform.<sup>17</sup>

*Our analysis suggests that rape myths continue to dictate defence strategies and continue to be accepted by jurors and members of the judiciary. Accordingly, we suggest that an important task of feminist legal scholarship is to analyse the **qualitative** content and effects of rape law reform and its operation in courtroom discourse, in order to support, rather than give up on, future reform efforts.*

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- 13 See the attrition research outlined in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 71–83, and more recently *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019) <https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf> at 8.
- 14 Elaine Craig “The Inhospitable Court” (2016) 66 *University of Toronto Law Journal* 197 at 200.
- 15 Elisabeth McDonald “‘Real Rape’ in New Zealand: Women Complainants’ Experience of the Court Process” (1997) 1 *Yearbook of New Zealand Jurisprudence* 59. See further Chapter Two in which we discuss that even in what would be considered stranger rape cases, the issue at trial is still consent: at 20. Due to this finding, and our inclusion of these cases in the principal research study, we refer to “adult rape” cases rather than “acquaintance rape” cases.
- 16 See Gerd Bohner and others “Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator” in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan Publishing, Devon, 2009) 17.
- 17 Anastasia Powell and others “Meanings of ‘Sex’ and ‘Consent’: The Persistence of Rape Myths in Victorian Rape Law” (2013) 22 *Griffith Law Review* 456 at 476.

Much other research indicates that fact-finder agreement with rape mythology is an indicator of verdict choice,<sup>18</sup> and that “real rape” remains easier to prove.<sup>19</sup> This research project, however, was not specifically aimed at developing proposals that will increase conviction rates per se,<sup>20</sup> but rather to document what is occurring in the trial, and to consider whether changes can be made to reduce complainant distress within the current adversarial trial process – while not impacting on fair trial rights of defendants (see Chapter Two).<sup>21</sup> In this sense, the work can be seen as part of a wider discussion on the desirability of a trauma-informed approach underpinning reform of the criminal justice system.<sup>22</sup> The focus on fair trial rights in this project is primarily, and unashamedly, on those of the complainant witness – however the reforms proposed have been crafted with the rights of defendants firmly in mind (see Chapter Ten).<sup>23</sup>

There is one exception to this project being primarily aimed at procedural reform – and it arose out of our observation concerning the outcome in cases involving the alleged rape of an intoxicated young woman. Although this book rarely links commentary on process with verdict, we consider that the lack of convictions in cases where the complainant has little or no memory of the relevant events because of her level of intoxication is worthy of comment and public discussion (see Chapter Seven).

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- 18 See for example Louise Ellison and Vanessa E Munro “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *The British Journal of Criminology* 202; Louise Ellison and Vanessa E Munro “A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 *New Criminal Law Review* 781; Jennifer Temkin, Jacqueline Gray and Jastine Barrett “Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study” (2016) 22 *Feminist Criminology*; Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, Oxford, 2008); Sokratis Dinos and others “A Systematic Review of Juries’ Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?” (2015) 43 *International Journal of Law, Crime and Justice* 36; Dominic Willmott “An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials” (Doctoral thesis, University of Huddersfield, 2018).
- 19 Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, London, 2005) at 73; *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019). This recent study noted that in 74% of cases the perpetrator was known to the victim, but compared to strangers, intimate partner victimisations in court were less likely to be convicted (30% as compared to 51%): at 3–4 and 58.
- 20 As noted by Anna Carline and Clare Gunby in “Rape Politics, Policies and Practices: Exploring the Tensions and Unanticipated Consequences of Well-Intended Victim-Focused Measures” (2017) 56 *The Howard Journal of Crime and Justice* 34, measures which focus on supporting the complainant often sit in tension with other objectives, such as to improve conviction rates: at 48.
- 21 See also Phoebe Bowden, Terese Henning and David Plater “Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An Impossible Triangulation?” (2014) 37 *Melbourne University Law Review* 539 at 562.
- 22 Karen Rich “Trauma-Informed Police Responses to Rape Victims” (2018) 28 *Journal of Aggression, Maltreatment & Trauma* 1; Louise Ellison and Vanessa E Munro “Taking trauma seriously: Critical reflections on the criminal justice process” (2017) 21 *International Journal of Evidence & Proof* 183; Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019).
- 23 See Simon Bronitt and Patricia Eastaugh *Rape Law in Context: Contesting the Scales of Injustice* (Federation Press, Leichhardt NSW, 2018) at 8, who write of the desirability of considering the nature of a fair trial “through a normative lens of the paramount right to dignity”.

A further aspect of this research, which provides somewhat of a snapshot of the current trial process in adult rape cases,<sup>24</sup> is the documenting of how the current rules of evidence and procedure are working in practice. This study, and the later comparator pilot study,<sup>25</sup> assess cases that went to trial after the introduction of the Evidence Act 2006, and some later cases were subject to the more recent rules under the Criminal Procedure Act 2011 and the Evidence Amendment Act 2017. The aim of both studies was to identify the extent to which reforms specifically drafted to assist complainants to give their best evidence, introduced under the Evidence Act 2006 in particular, are being applied in a manner consistent with their stated purpose (see Chapters Five and Six).

An exercise related to the observation of the rules of evidence in practice (including the use of legislatively mandated jury directions), was consideration of how juries are directed on the existing substantive law, particularly in relation to consent (see Chapter Seven). Access to closing arguments and jury directions provided information about what juries are told about the law as it applies to the particular facts, and allowed insights into whether and how rape myths are reinforced or problematised at this stage of the trial – a point at which most complainants are absent (see Chapter Nine).

As well as documenting the current trial process, as it impacts on adult complainants, the principal research aimed, as previously stated, to propose reform to law and process in order to improve the experience of these complainants when they go to court (see Chapter Four). In relation to all aspects of the research, the focus was not on criticising, or naming, individual practices by certain judges or counsel but, rather, on identifying trends and practices across adult rape trials. However, the methodology of the project allowed identification of particular examples of what we consider to be best practice, including how to test complainant evidence without reliance on rape mythology or the “real rape” schema.

### ***Impact of the access to audio files***

The documented experiences of adult rape complainants in trials where the issue was consent and the invariable link with rape mythology provided this project with its main focus. Other local and international studies have provided, and still provide, insights into the particular difficulties faced by child complainants in sexual cases<sup>26</sup> and, to a lesser

24 Given that the initial focus of the research on a particular type of alleged sexual violation (rape), only of a female adult by a man they know (but are not in a relationship with) and the issue at trial is consent (and including no cases involving multiple defendants or multiple complainants), the research can more fairly be described as providing insight into a particular type of cases involving allegations of sexual violence. See further Chapter Two at [20](#).

25 See below at [10](#).

26 Kirsten Hanna and others *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (Institute of Public Policy, AUT, Auckland, 2010).

extent, adults with a learning disability.<sup>27</sup> A project focussed on adult complainants, in and of itself, therefore, provides an important contribution to the global research. However, this project had a relatively unique aspect that allowed insights into the questioning process and its impacts, previously largely hidden from view: researcher access to the audio of the complainants' evidence.

Many researchers have analysed trial transcripts in order to, among other things, document the types of questions that are asked and how often – analysis that does allow critique of how some of the rules of evidence are working in practice and exposes reliance on contestable behavioural expectations.<sup>28</sup> Important local work has provided an historical comparison of cross-examination in rape cases.<sup>29</sup> Other recently completed research in England, for example, was conducted through court observation,<sup>30</sup> court file access and interviews with counsel.<sup>31</sup> However, with the exception of only one other, we believe, reform-focussed project,<sup>32</sup> researchers analysing trial process in rape cases have not had access to audio files or recordings.

Access to the audio of the complainant's trial testimony allowed the annotation of much information which does not form part of the transcript (or Notes of Evidence ("NOE")) which is made available to the jury (after being checked for accuracy) during their deliberations. Information not annotated (as it is not "evidence") includes:

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- 27 In Aotearoa New Zealand, the term intellectual disability is commonly used in the contexts of diagnosis and funding allocation; however, the term learning disability is increasingly being used interchangeably with intellectual disability. This change in terminology is being led by people with learning disabilities themselves. The term learning disability is therefore used to respect the wishes of Ngā Tāngata Tuatahi – People First New Zealand, a national Disabled Person's Organisation whose members express a clear preference for learning disability rather than intellectual disability. (Our thanks to Brigit Mirfin-Veitch from the Donald Beasley Foundation for her assistance with this language choice.)
- 28 See for example: Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018); Susan Ehrlich "Perpetuating – and Resisting – Rape Myths in Trial Discourse" in Elizabeth A Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) at 389; Emma Henderson and Kirsty Duncanson "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" (2016) 39 University of New South Wales Law Journal 750.
- 29 Sarah Zydervelt and others "Lawyers' Strategies for Cross-Examining Rape Complaints: Have We Moved Beyond the 1950s?" (2017) 57 British Journal of Criminology 551.
- 30 See for example: Olivia Smith and Tina Skinner "How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 Social & Legal Studies 441; Olivia Smith *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018); Jennifer Temkin, Jacqueline M Gray and Jastine Barrett "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2016) 22 Feminist Criminology 1; Ruth Durham and others *Seeing is Believing: The Northumbria Court Observers Panel* (Police and Crime Commissioner England & Wales, 2017).
- 31 Laura Hoyano *The Operation of the YJCEA 1999 Section 41 in the Courts of England & Wales: Views From the Barristers' Row* (Oxford Legal Studies Research Paper No. 17/2019, November 2018).
- 32 New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996).

- ▶ the judge's or lawyer's interaction with the complainant (other than questions to elicit evidence);
- ▶ objections to certain questions by counsel (lawyers for the Crown and the defendant) or the judge;
- ▶ impact of the physical courtroom constraints;
- ▶ discussion about admissibility and process issues, including in the absence of the jury;
- ▶ complainant pauses, silence and displays of emotion; and
- ▶ the tone, style, pace and volume of the participant's voice (judge, counsel or complainant).

Access to the audio therefore allowed exploration of any links between the type and content of questioning and complainant distress. Given that courtrooms in Aotearoa New Zealand are closed to the public when a complainant in a sexual case<sup>33</sup> gives evidence,<sup>34</sup> court observation work that would also allow researchers to see complainant emotionality is difficult (and expensive) to undertake in a sustained way.<sup>35</sup>

Research undertaken during the Gender Bias and the Law Project by the New South Wales Department for Women in 1996, entitled *Heroines of Fortitude: The experiences of women in court as victims of sexual assault*, (*Heroines of Fortitude*) included the study of “**all sound recorded** sexual assault hearings in the District Court of New South Wales over a one year period [1 May 1994–30 April 1995] where the accused was charged with sexual assault and where the victim was an adult female.”<sup>36</sup> The use of sound recordings and the focus on adult complainants of sexual assault are factors in common with the research for this book. However, the *Heroines of Fortitude* research was significantly wider in scope as it covered all forms of sexual violence (not just rape, as defined in *section 128 of the Crimes Act 1961*), as well as including cases of stranger and intimate partner sexual violence. Further, the project that is the subject of this book was aimed at a particular aspect of the trial process (questioning of the complainant), while the *Heroines of Fortitude* work also analysed sentencing and directed verdicts.

Leaving scope to one side, the *Heroines of Fortitude* research does include a number of important observations made possible through the access to sound recordings, especially

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33 Defined in section 4 of the Evidence Act 2006, in Appendix Two.

34 Pursuant to section 199 of the Criminal Procedure Act 2011, in Appendix Two.

35 Aside from the challenges of accurately recording, given the rules of court governing note-taking, the impact of particular questioning as noticed by researchers.

36 New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996) at 1, emphasis in original.

with regard to questions about credibility.<sup>37</sup> However, that research, no doubt given the multi-faceted nature of the work, did not fully explore all the links between content and type of questioning and complainant distress.<sup>38</sup> That ground-breaking and powerful 1996 report does, however, allow us to make some observations about the impact of questioning historically, with reference to material from a very similar jurisdiction gathered from cases heard 25 years ago.

### ***Related current research and initiatives: Sexual Violence Court Pilot***

Following the publication of *From “Real Rape” to Real Justice*,<sup>39</sup> as well as during the period of the principal research, a number of other initiatives were begun or completed. In December 2015, the Law Commission delivered to the Minister *The Justice Response to Victims of Sexual Violence*.<sup>40</sup> This report was finished after some delay and changes in personnel involved including the positions of Minister of Justice and President of the Law Commission. Perhaps as a consequence, the recommendations in that Law Commission report do not echo many of the proposals that had received strong support in the submissions received after publication of the 2012 Issues Paper.<sup>41</sup> Further, the 2015 Report left untouched many relevant rules of evidence and procedure, preferring to leave those matters to the second review of the Evidence Act 2006.<sup>42</sup> The Terms of Reference of that review, begun in March 2017 and concluding with a report to the Minister in February 2019, included a specific focus on the application of the Act to cases involving sexual and family violence.<sup>43</sup>

On 2 July 2019, the Under-Secretary to the Minister for Justice announced the Government’s current responses to the 2015 Law Commission Report,<sup>44</sup> including the proposed content of the Sexual Violence Legislation Bill, introduced on 11 November 2019, which contains a number

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37 At 149–181.

38 New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996) at 127–130.

39 Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

40 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

41 New Zealand Law Commission *Alternative models for prosecuting and trying criminal cases* (NZLC IP30, 2012).

42 New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018).

43 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

44 *Proactive Release – Improving the justice response to victims of sexual violence* (including funding voluntary specialist training for defence counsel) <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>



of the recommendations from the second review of the Evidence Act 2006.<sup>45</sup> As part of the longer-term work programme, the Under-Secretary proposes to consider also “whether, and how, the law should positively define what consent is”,<sup>46</sup> but, at the time of writing, any other review or reform of the substantive law relating to rape, or any other sexual offending, is not on the legislative agenda.

Prior to any Cabinet response to the 2015 Report, which included recommendations relating to “Court Specialisation”,<sup>47</sup> the Chief District Court Judge announced the commencement of a pilot to begin in December 2016.<sup>48</sup> In line with the Law Commission’s recommendations that any such specialist court should be evaluated after two years, the Sexual Violence Court Pilot (“the Pilot”) was due to end in April 2019, but was extended in order that all aspects of the evaluation could be completed.<sup>49</sup> A range of evaluative measures are being, or have been, commissioned or undertaken by the Ministry of Justice, as well as by independent researchers.<sup>50</sup>

At the time of the commencement of the Pilot, our principal research study (30 cases) was under way and provided an opportunity to participate in the assessment of the Pilot by doing a comparative piece of work. With funding and support from the New Zealand Law Foundation and the University of Canterbury, a comparator set of 10 Pilot cases was accessed (see further Chapter Two). Throughout this book, cases from the Pilot are discussed in contrast to the cases in the principal research, in order to determine to what extent this type of specialisation (including fast tracking, careful case management and judicial training), impacts on the questioning process (see Chapter Eight), use of evidential rules, jury directions and reliance on rape myths. This type of assessment of the Pilot was, as the

45 Including extending the scope of section 44 (the “rape shield” provision, see further Chapter Five); introducing recording of a complainant’s evidence for use at a retrial; entitlement to given evidence by pre-recorded cross-examination; development of counter-intuitive jury directions: *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* <https://www.beehive.govt.nz/sites/default/files/2019-09/Govt%20Response%20to%20Law%20Commission%20report%20-%20Second%20Review%20of%20the%20Evidence%20A....pdf>

46 *Proactive Release – Improving the justice response to victims of sexual violence* at [81] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>

47 Recommendations 17–27. See also Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 272 (Recommendation 7.4).

48 Chief District Court Judge Jan-Marie Doogue “District Courts to Pilot Sexual Violence Court” (Media Release, 20 October 2016) and <http://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-pilot-court/>

49 <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/sexual-violence-court-pilot-to-continue2>

50 For example, the work by Fred Seymour: <https://www.lawsociety.org.nz/practice-resources/the-business-of-law/access-to-justice/new-projects-show-range-of-foundation-work>



writers acknowledged, not part of the evaluation completed in July 2019,<sup>51</sup> but that evaluation has provided very helpful contextual material for the development of our reform proposals.

### ***Matters outside the scope of this book and choices about content***

Much work remains to be done to fully assess the trial process in sexual cases, in order to respond to the concerns still expressed by participants. Case-based research which examines the particular impact of the criminal justice system on Māori rape complainants remains embarrassingly overdue. It is hoped that the dissemination of the methodology and findings of this tauīwi-led<sup>52</sup> project will encourage funders to adequately support initiatives that employ kaupapa Māori,<sup>53</sup> in order to develop culturally responsive reform of law and practice.<sup>54</sup>

The extent to which trial process delivers defendant fair trial rights remains an important issue. While rates of incarceration, especially of Māori, and the need for alternative methods of resolution remain politically and socially topical (and rightly so),<sup>55</sup> it is essential that reforms are grounded in robust and independent research.

One significant area of enquiry that should be undertaken, as touched on at various points in this book, would document and evaluate the gathering, disclosure and use of medical forensic evidence as it relates to complainants. Concern is often expressed that irrelevant and highly personal information is admitted at trial, based only on the fact that it is contained in the medical professional's clinical notes, related to the complainant's medical history, and has been disclosed to the defence. On many occasions, the complainant is not prepared by the prosecutor for questions about this material, and offering it as part of an expert witness' report may well mean it is not subject to other applicable rules of evidence.

Other matters also are not explored in this book, but will form part of other publications, as the result of choices made as to how to first write about the cases and the analysis. As the primary focus of both the principal and the pilot studies was to document and analyse the questioning process, as well as the reinforcement and resistance to rape myth in closings and jury directions, other trial process dynamics and observations have not been included. For example, although we report on the gender of judges and counsel, we have not produced an analysis of whether gender is linked to approach or performance, nor have we always

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51 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 9. The Pilot will now become a permanent feature in Auckland and Whāngārei, and the Chief District Court Judge expects that all jury trial judges will adopt the Pilot guidelines: <http://www.districtcourts.govt.nz/media-information/media-releases/14-august-2019/>

52 Non-indigenous New Zealanders.

53 An approach to research that embodies Māori principles and world view.

54 See *He Waka Roimata: Transforming Our Criminal Justice System* (2019) at 26 <https://www.safeandeffectivejustice.govt.nz/about-this-work/te-uepu-report/>

55 See *Hui Māori: Ināia Tonu Nei* (2019) <https://www.safeandeffectivejustice.govt.nz/about-this-work/hui-maori/>

connected admissibility decisions or the content of jury directions to the verdict. Similarly, we are yet to complete our analysis of how often, and to what effect, complainants themselves resist reliance on rape mythology, and resist the questioning process itself. With the almost overwhelming amount of material available as a result of the methodology we chose, it was not possible in the time available, given the desirability of contributing to Government consideration of the Pilot and other reform proposals, to write up all of our findings by the end of 2019.

A related issue was the matter of **how** to divide up the commentary on aspects of the trial process into chapters for the purpose of a book publication. While some content was more easily separated out (such as description of the methodology), many observations about the questioning process are interlinked. For example, the admissibility of sexual history evidence as relevant to consent (Chapter Five) is obviously connected to considerations of consent as an element of the offence (Chapter Seven) as well as to the impact of the evidence on the complainant (Chapters Four and Eight). We hope that the reader will understand the difficulty of the task of chapter allocation and manage to navigate, and forgive us for, the many consequential cross-references.

Finally, with regard to the writing-up process, some light editing of the extracts from the annotated trial transcripts has been done in the interests of comprehension or to ensure confidentiality (see also Chapter Two).

### ***Further comparative research***

While completing this book, the researchers, with the support of the Borrin Foundation, have been working on a further comparator project – one that compares the 40 adult rape cases with 20 cases involving intimate partner sexual violence.<sup>56</sup> Many of these cases also involve allegations of physical violence and, as such, provide commentary on the impact of dual and overlapping expectations of the behaviour of real victims/survivors of family violence. Analysis of the trial process in such cases is very limited internationally, and this piece of work will provide a basis for further consideration of what support should be provided to complainants in such cases – many of whom have multiple vulnerabilities yet choose to engage with an adversarial trial process.

At the conclusion of this work, another project will be under way, comparing the 60 jury trial cases with 20 trials concerning adult rape cases heard by a judge sitting alone. The research team will be analysing the factors that make giving evidence in sexual violation trials distressing (whether the complainant was an acquaintance or intimate partner of the defendant) and assessing whether the dynamics of the questioning process are different in judge-alone trials (JATs). Other aspects of the analysis will focus on the application of the

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56 To be published early 2021.

rules of evidence and procedure in JATs and the extent to which rape mythology, and/or the “real rape” schema, is reinforced or resisted during the trial.

Anecdotal evidence suggests that in judge-alone trials cross-examination is shorter, there is less reliance on the “real rape” schema, and the issues at trial are more focussed. It is also likely that JATs involve fewer delays and pre-trial appeals, and that the hearings are not as disrupted (for example, by the need for legal argument in the absence of the jury). There is also some research that indicates a difference in verdict choices between judges and juries in the specific context of cases involving allegations of sexual violence.<sup>57</sup>

The purpose of this piece of comparative rape trial process research is to provide material that can be used to inform public debate about the desirability of reforming the jury system. This is particularly timely given the Law Commission’s proposal that sexual cases should be tried without a jury,<sup>58</sup> and, more recently, the announcement that this issue is on the Ministry of Justice’s longer-term work plan.<sup>59</sup>

### ***Language use and writing conventions in this book***

It will already be apparent that the research discussed in this book relates to the analysis of adult rape trials, in which the complainant is female and the defendant is male. While the offence of sexual violation by rape (section 128 of the Crimes Act 1961) need not be restricted to involve cisgendered individuals,<sup>60</sup> as discussed in Chapter Two, there are no indications that any of the complainants in the 40 cases we accessed were trans or non-binary people. This is unsurprising given the low rates of reporting by trans and non-binary people, despite high rates of offending against them,<sup>61</sup> and the likelihood that any reported offending would likely be charged as unlawful sexual connection, rather than rape, due to the definition of the offence requiring that “person B” has female genitalia.<sup>62</sup>

57 Harry Kalven and Hans Zeisel *The American Jury* (Little Brown, 1966) at 253–254, cited in Vivian Berger “Man’s Trial, Woman’s Tribulation: Rape Case in the Courtroom” (1977) 77 *Columbia Law Review* 2 at 30.

58 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.48]–[6.49].

59 *Proactive Release – Improving the justice response to victims of sexual violence* at [87] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>

60 See the definition of “penis” and “genitalia” in section 2 of the Crimes Act 1961, see Appendix Two.

61 *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* <https://countingourselves.nz/>

62 See generally Elisabeth McDonald “Gender Neutrality and the Definition of Rape: Challenging the Law’s Response to Sexual Violence and Non-Normative Bodies” (2019) 45 *University of Western Australia Law Review* 166.

The reason for the focus on the specific charge of sexual violation by rape was the desire to explore the impact of rape mythology on the trial process. We also focus on the experience of adult women as rape complainants, rather than children or men, not to ignore or to render invisible the experiences of those complainants, but rather to build on our own expertise while continuing to value and support the work of others. Further, it continues to be the case that ideas and lived experience of gender are deeply bound up in how sexual violence occurs and is understood in Aotearoa New Zealand.<sup>63</sup> It remains true that victims/survivors are significantly more likely to be women, and alleged offenders are overwhelmingly more likely to be men.<sup>64</sup> In that sense, and as a group of Pākehā feminist researchers,<sup>65</sup> we wish to continue to contribute to the public discussions on the impact of sexual violence on women's lives – including the impact of the response of the criminal justice system.

In referring to the person who gives evidence of her experience of being raped, we use the word “complainant”, as by this stage of the trial process that is the name given to a person in that (significant) role. This is not to suggest that the rape has not occurred or that she is not a victim or a survivor – but rather that she is the primary witness for the Crown and there are particular rights, protections and procedural rules that attach to that status. We also refer to the alleged rapist as the defendant, as that is the language used to describe a suspect once the trial has begun, and even at the pre-trial stages for the purposes of some legislation and rules of practice. Counsel (lawyers in the trial) are referred to as defence counsel, or counsel for the defendant, and the lawyer for the prosecution as either Crown counsel or the prosecutor.

### **Consultative workshops**

In August 2019, with funding and support from the Borrin Foundation, the New Zealand Law Foundation, the University of Canterbury and the Centre for Non-Adversarial Justice (AUT), some of the preliminary reform proposals were discussed at two day-long hui (meeting). These consultative workshops, held in Auckland and in Wellington, were attended by groups of invited people with expertise and knowledge of the trial process in adult rape cases and

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63 As in other comparable jurisdictions: It is important to assert “that the harm is different because of women’s disproportionate victimisation, the historical legacy of rape for women and because of sexual difference, and [to suggest] an historically contextual approach to law-making that is respectful of that difference”: Yvette Russell “Thinking Sexual Difference Through the Law of Rape” (2013) 24 *Law and Critique* 255 at 262.

64 “Sexual assault is a clear example of an offence which women experience much more often than men. The survey found that almost 200,000 sexual assaults happened to almost 90,000 adults within 12 months. Women made up 71% of the victims and suffered from 80% of the sexual assault incidents. The number of sexual assault incidents per 100 women is almost four times higher than per 100 men”: *New Zealand Crimes and Victims Survey 2018 Topical report: An overview of important findings* (Ministry of Justice, 2019) at 14 <https://www.justice.govt.nz/assets/Documents/Publications/NZCVS-topical-report-Important-findings-Cycle-1-2018-v1.1-fin.pdf>

65 New Zealander of European descent – probably originally applied to English-speaking Europeans living in Aotearoa New Zealand: <https://maoridictionary.co.nz>

of the Sexual Violence Court Pilot.<sup>66</sup> Invaluable context, insights and comparative analyses were provided by visiting international experts, Vanessa Munro and Julia Quilter.<sup>67</sup>

Prior to the hui, the participants were sent a summary of the reform proposals and some supporting information about the context and rationale for those proposals. This summary, as it was distributed but with minor editing, is included in Appendix Three. The meetings were expertly facilitated by Māmari Stephens<sup>68</sup> and Jon Everest.<sup>69</sup> The extremely valuable comments and feedback from those sessions have been incorporated into the proposals contained in Chapter Ten. Many of the participants also provided further peer review of the draft chapters of this book.<sup>70</sup>

The content of the discussions was of significant assistance in the development of the final form and content of the proposals and the book. Of even more importance to this area of work, however, was the openness and respect for each other's perspective made apparent by those present, and the shared acceptance of the need to continue to examine and discuss the legal responses to sexual offending in Aotearoa New Zealand.

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66 The list of attendees and their affiliations is contained in Appendix Four.

67 Professor of Law, University of Warwick; Associate-Professor of Law, University of Wollongong – see also the Preface and Acknowledgements at [xix](#).

68 Te Rarawa/Ngāti Pākehā, Associate Professor, Faculty of Law, Victoria University of Wellington.

69 Mediator and facilitator, Senior Consultant to the Diana Unwin Chair in Restorative Justice, Victoria University of Wellington.

70 See the Preface and Acknowledgements at [xix](#).

## CHAPTER TWO

**ABOUT THE RESEARCH: CASES, METHODOLOGY AND ANALYSIS***Overview of the studies*

This book records the results of two research projects. The first, referred to as the principal study, analysed 30 rape trials which occurred between 1 January 2010 and 30 September 2015 in nine courts across New Zealand. The second, the pilot study, analysed 10 rape trials held between November 2017 and November 2018 in the Sexual Violence Court Pilot in the Auckland and Whāngārei District Courts.<sup>1</sup> The studies were conducted as a comparison, meaning that the same types of case materials were used and the same analytical process was applied, so that similarities and differences in findings could be assessed. This chapter provides a description of the processes used to identify, select and analyse the cases, discusses the ethical and representational issues that arose from the research and offers an overview of the factual and trial characteristics of the cases in each of the studies.

The first section of this chapter begins with a description of the processes used to identify potentially appropriate trials and the criteria used to select the cases. It sets out the steps used to identify a sufficient number of recent adult rape trials from a cross-section of New Zealand court registries to form the basis of the principal study. The processes of identification and selection were aimed at ensuring that the cases chosen were both sufficiently similar in fact pattern and trial characteristics to produce a coherent analysis, and of sufficient geographical spread to provide a snapshot of contemporary adult rape trials in New Zealand. This part of the chapter also discusses the approval for access process, provides information about the Sexual Violence Court Pilot and describes how the cases were identified and accessed for the pilot study.

The latter part of this section considers the ethical implications of accessing and using the case materials, and describes how they were analysed. The close analysis of sensitive personal material, especially the audio recordings of complainant testimony, gave rise to a range of ethical considerations in relation to access, consent, care and confidentiality. This part of the

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<sup>1</sup> Auckland District Court is based in Auckland city, a busy urban centre. Whāngārei is a significantly smaller northernmost city in the Northland region of Aotearoa New Zealand.

chapter outlines how these considerations were managed as well as the implications for how the research has been written up. It includes an explanation of how the audio recordings of the complainants' evidence were used to augment the transcripts of evidence, and how that material was coded and analysed. It also describes the types of codes that were used across the range of case materials.

The second section of the chapter provides a description and discussion of the factual context and trial characteristics of the cases. It sets out what is known about the complainants and facts of the cases as a group; for instance, the range of ages of the complainants and the nature of the relationships between the complainants and defendants. It also describes what is noticeably patterned in the fact scenarios across the studies, in particular the high proportion of young women complainants, and the prevalence of alcohol consumption and of mental, physical and social vulnerabilities. This section then presents the trial related features across the two studies, such as factors related to the complainant giving evidence – for instance, time as a witness; factors related to trial setting – such as judge, counsel and juror gender; and trial outcome factors including verdicts, sentences and appeals. For a description of alleged facts, charges and outcomes in each individual case, see *Appendix One*.

We make some concluding observations about what the cases as a group suggest about the nature of contemporary adult rape trials in Aotearoa New Zealand.

## ***Gathering and working with the case materials***

### **Identifying appropriate cases for inclusion in the principal study**

The primary purpose of this research was to assess the degree to which rape myth is operating in contemporary trials and the degree to which it might be contributing to complainant distress and dissatisfaction with the criminal justice system.<sup>2</sup> Low reporting rates and high attrition rates during the criminal investigation of sexual assaults are well documented,<sup>3</sup> as is complainant fear of being blamed and disbelieved, and of the cross-examination process, as reasons for

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2 See also Chapter One at 3 and Chapter Three at 39.

3 Ministry of Justice *New Zealand Crime and Safety Survey 2014* (Ministry of Justice, Wellington, 2015) at 106; Sue Triggs and others *Responding to sexual violence: attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, 2009) at viii; Jan Jordan and Elaine Mossman "Women, Rape and the Police Investigation Process" (research presentation to Victoria University of Wellington, 16 April 2019); Jan Jordan *The Word of a Woman? Police, Rape and Belief* (Palgrave Macmillan, London, 2004); Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019) <https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf>

withdrawal.<sup>4</sup> Behind those fears, lies an awareness that rape myths are widely accepted, and may influence attitudes and decisions made by investigators, prosecutors, juries and judges, as well as questioning during cross-examination.<sup>5</sup> Rape mythology is most commonly associated with “acquaintance rape” scenarios precisely because they do not conform to the “real rape” schema in which a depraved stranger violently attacks an appropriately modest woman who immediately and consistently behaves as it is imagined such a person would.<sup>6</sup> “Acquaintance rape” cases are those in which the complainant and defendant are adults who are neither strangers nor family members. Acquaintance rape scenarios are typically thought of as those that involve a man who is accused of raping a woman in a context in which consenting sexual activity could possibly be imagined.

The initial criteria for case selection for these studies was, therefore, recent rape trials that involved an adult female complainant and male defendant, who were known to each but not close kin or domestic partners, and in which consent or belief in consent was the issue in dispute. In order to identify them, legal databases publishing New Zealand judgments were searched. Cases with at least one sexual violation by rape charge<sup>7</sup> involving an adult female complainant and an adult male defendant in trials commencing after 1 January 2010 were selected.

The focus on female complainants who were adults at the time of the alleged offending and a sexual violation by rape charge by an adult male was intentional given the gendered and

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- 4 Denise Lievore *Non-reporting and Hidden Recording of Sexual Assault: An international literature review* (The Commonwealth Office of the Status of Women, Commonwealth of Australia, 2003) at 28–34; Liz Kelly *Routes to (In)justice: A research review on the reporting, investigation and prosecution of rape cases* (Child and Woman Abuse Studies Unit, University of North London, 2001) at 9; Pia van de Zandt “Heroines of Fortitude” in Patricia Easteal (ed) *Balancing the Scales: Rape, law reform and Australian culture* (The Federation Press, Sydney, 1998) at 107; Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women’s Affairs, Wellington, 2009) at 5; Elaine Mossman and others *Responding to sexual violence: environmental scan of New Zealand agencies* (Ministry of Women’s Affairs, Wellington, 2009) at 94; Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims’ experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 79; Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research, Development and Statistics Directorate, London, 2005) at 64.
  - 5 See for instance, Jennifer Brown, Carys Hamilton and Darrah O’Neill “Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors” (2007) 13 *Psychology, Crime & Law* 355; Sara Payne *Rape: The victim experience review* (Home Office, London, 2009); Katrin Hohl and Elisabeth Stanko “Complaints of Rape and the Criminal Justice System: Fresh evidence on the attrition problem in England and Wales” (2015) 12 *European Journal of Criminology* 324; Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women’s Affairs, Wellington, 2009); Jan Jordan *The Word of a Woman? Police, Rape and Belief* (Palgrave Macmillan, London, 2004); Barbara Krahé and Jennifer Temkin *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, Oxford, 2008).
  - 6 For instance: physically and vehemently resists the attack, immediately complains of rape, avoids contact with all aspects of the attack, does not delay reporting to the authorities, suffers traumatic stress and reduces her social and sexual activity in the future. See further Chapter Three.
  - 7 See section 128 of the Crimes Act 1961 in Appendix Two.



heteronormative nature of rape myths and characterisations of “real” victims.<sup>8</sup> Cases with multiple complainants and defendants were excluded because of concern about potential case and analytic complexities. Trials that had commenced after 1 January 2010 were chosen due to the commencement of the Evidence Act 2006 and the national implementation of “For The Record” software which makes audio recordings of trial proceedings for transcription. Funding for the research was available through the Marsden Fund and allowed for 25 to 30 cases to be included in the principal study.

The initial database search identified cases that had resulted in a conviction because a large proportion of publicly available decisions are appeals against conviction and/or sentence. However, New Zealand research has established that it is usual for fewer than half of prosecuted sexual violation charges to result in conviction.<sup>9</sup> In order to locate more cases that had resulted in acquittal and achieve a more reflective selection of cases, an Official Information Act request was made to the New Zealand Police, who provided a list of trials that included charges classified as “Male Rapes Female over 16” between 1 January 2010 and 30 September 2015. This list was used to specifically identify trials resulting in acquittal on the sexual violation by rape charge.

In order to balance a national spread including regional and urban centres and an approximate representation across court level alongside practical and funding limitations, ten registries across seven locations were selected, being three High Court and seven District Court registries;<sup>10</sup> seven in the North Island and three in the South Island. The list of trials from the police did not include any factual or contextual information, so in each of the selected localities the Crown prosecutor was asked to review the list of trials to identify cases that appeared to fit the study criteria.

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8 See Chapter One at 14.

9 Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, Wellington, September 2009) at viii. In that study the sample was 1,955 police files coded as adult sexual violation between 1 July 2005 and 31 December 2007. Of the 600 cases that went to trial, 42% of prosecutions with at least one sexual violation charge resulted in conviction, 27% resulted in an acquittal, 14% were discharged by the judge and 17% were withdrawn by the prosecution. In the most recent study, Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019), 35% of cases going to trial resulted in a conviction (27% for a sexual violation charge) <https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf>

10 The hierarchy of general courts in Aotearoa New Zealand is the Supreme Court of New Zealand, the New Zealand Court of Appeal, the High Court and the District Court. The level of trial court for sexual violation charges is usually, as a matter of practice, the District Court, however trials for sexual violation may be heard in the High Court when the offences involve particular features such as those involving multiple complainants or defendants, complainants who are especially vulnerable or young, significant additional violence or the likelihood of a sentence of preventative detention. Defendants charged with sexual violation by rape (a category 3 offence) may elect trial by jury (section 50 of the Criminal Procedure Act 2011), and in exceptional circumstances the court may order that the trial be by judge alone (sections 102 and 103 of the Criminal Procedure Act 2011).

From these sources, a list of 64 trials was compiled. The Judicial Research Committee, the Heads of Bench and the Human Participants Ethics Committee of Victoria University of Wellington were all consulted on ethical considerations and aspects of permission to access the case materials (see further below). Requests to access the case records were made pursuant to Rule 6.9 of the Criminal Procedure Rules 2012 (which was then in force). Access to most of the requested cases was granted. Members of the research team (the author, for all except one court) then attended the relevant registry to review the case files and collect case information and any materials not electronically available.

### Selecting adult rape cases for the principal study

After examining the court files, further selection decisions were made. Initially, this involved excluding trials or cases that did not meet the study criteria or were deemed inappropriate for inclusion. For instance, two cases had two complainants but in each case there was a sexual violation by rape charge against only one of the complainants, so only the evidence of that complainant was analysed. Two case files included a retrial. With regard to one case, the first trial was included in the study, while in the other the second trial was included because at the first trial penetration had been denied, whereas at the retrial the defence theory of the case was belief in consent. Some cases were excluded from the study because they had characteristics that would have made it difficult to maintain the anonymity of the complainant. Two cases were excluded because the complainant and defendant were related.

On review of the factual circumstances of the remaining cases, it became apparent that there were several types of cases within the larger group of identified cases. The pre-existing relationship between the defendant or complainant or the type and number of other violence charges identified some cases as intimate partner sexual violence rather than acquaintance rape cases. These cases were excluded from the principal study, and funding to analyse them separately, but in comparison to this research, has been secured.<sup>11</sup> In addition, two judge-alone trials were excluded from the principal study on the basis that the difference in fact-finder is likely to make a difference to the trial process.<sup>12</sup>

Nine cases involved a complainant and a defendant who were strangers before the events in question. Initially, these cases were excluded on the basis that there was no relationship

11 This funding was provided by the Borrin Foundation and the research will be the subject of consultative workshops in November 2020. <https://www.borrinfoundation.nz/grants/prosecuting-intimate-partner-sexual-violence-reforming-trial-processes-for-complainants-with-multiple-vulnerabilities>

12 Judge-alone trials for sexual offending are more frequent in New Zealand since the commencement of the Criminal Procedure Act 2011 (1 July 2013) and offer an opportunity to compare the difference that juries make to the conduct of trials. Funding to undertake a study that compares judge-alone trials with the jury trials in the principal study and in the Pilot, has been provided by the New Zealand Law Foundation and the study will be completed in 2021.

of acquaintance and therefore they were not “acquaintance rape” cases. However, as we became more familiar with the trials including the facts and complainants’ evidence, the style in which the complainants were questioned and the theories of the defence case, the similarities between the acquaintance cases and the stranger cases in which consent or belief in consent was at issue became apparent. The centrality and deployment of rape mythology was very similar, as was the questioning content and structure of questioning in cross-examination. The two case types also shared similar factual circumstances with those cases in which an acquaintance pre-existed the events in question, but only minimally; for instance, where the complainant and defendant had met briefly once or twice through mutual friends in social circumstances. We therefore decided to include the “strangers but consent argued” cases, while continuing to exclude the cases in which there was no pre-existing relationship and the defence was a denial of penetration.

At the conclusion of these processes, 30 trials were selected for inclusion in the principal study. Given the inclusion of cases in which there was no previous acquaintance between the complainant and the defendant, rather they are all cases in which the defence at trial was consent, we changed the labelling of the group of trials to “adult rape” cases.

### Accessing adult rape cases from the Sexual Violence Court Pilot

The Sexual Violence Court Pilot is a judicially-led initiative that commenced in December 2016 and operates in two North Island District Courts – Auckland, which is a large urban area, and Whāngārei, which is a provincial city also servicing nearby rural communities. The aim of the Pilot was to improve the court experience for participants in sexual offences trials, specifically “to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant”.<sup>13</sup> The Pilot was initiated in response to the New Zealand Law Commission’s recommendation in *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* that a specialist District Court for sexual offences be trialled and evaluated.<sup>14</sup> The Law Commission’s report also recommended a wide range of changes to the prosecution of sexual offences, including reducing delay in cases getting to trial, less traumatic methods of giving evidence for complainants, specialist training for judges, the increased use of counter-intuitive evidence to combat rape myths, and increased support for complainants going to court.

The Pilot was established ahead of the Government’s consideration of the Law Commission’s full range of proposals and therefore operates within existing legislation. For this reason, the Pilot has focussed on the practical steps towards these goals that can be achieved within

13 Chief District Court Judge Jan-Marie Doogue “Putting a sexual violence court to the test” (2016) 899 LawTalk 32 at 32; Chief District Court Judge Jan-Marie Doogue “District Courts to pilot sexual violence court” (press release, 20 October 2016).

14 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) Recommendations 17–19.

the structure of a dedicated list court, supported case and trial management practices and increased judicial education and guidance.<sup>15</sup> It has included the development of best practice guidelines,<sup>16</sup> focussed application of the pre-trial aspects of the Criminal Procedure Act 2011 and context-informed use of the Evidence Act 2006.

The Pilot was evaluated in June 2019, assessing the extent to which it had achieved its outcomes, any unidentified consequences that had occurred and the resources and infrastructure that would be required to support a nation-wide provision of a specialist sexual violence court.<sup>17</sup> The evaluation found that the Pilot has improved trial timeliness and resulted in better practices of case management. These improvements are said to have reduced the risk of secondary victimisation through the justice processes for complainants.<sup>18</sup> The two current Sexual Violence Courts are now permanent and all jury trial judges are being encouraged to adopt the Pilot's guidelines in the future.<sup>19</sup> The Pilot's Governance Board is recommending that the specialist courts be rolled out nationally.<sup>20</sup>

The principal study was under way when the Pilot was announced, and offered the opportunity to compare the impact that increased judicial control and education has on the conduct of questioning of complainants, use of evidential rules, reliance on rape myth and jury directions. The Chief District Court Judge was therefore approached and with her support, applications to the New Zealand Law Foundation, the University of Canterbury Human Ethics Committee and the Judicial Research Committee were made and approved.<sup>21</sup>

In Auckland the selection criteria defined for the principal study were made available to a senior judge sitting in the Pilot, registry staff managing the Pilot cases and Crown prosecutors. A list of potentially suitable cases was compiled with their input. In Whāngārei, another senior judge sitting in the Pilot assisted with the identification of appropriate cases.

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- 15 Chief District Court Judge Jan-Marie Doogue "Putting a sexual violence court to the test" (2016) 899 *LawTalk* 32 at 32; Chief District Court Judge Jan-Marie Doogue "District Courts to pilot sexual violence court" (press release, 20 October 2016).
  - 16 Ministry of Justice *Sexual Violence Court Pilot: Guidelines for Best Practice* (2016) <http://www.districtcourts.govt.nz/reports-publications-and-statistics/publications/sexual-violence-pilot-court>
  - 17 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 1.
  - 18 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 3. However, note that this finding has limitations as to its generalisability because it is based on a relatively small number of interviews with complainants (nine) who were not randomly selected but referred by court and support workers.
  - 19 Gill Bonnett, "Sexual violence courts to be permanent after pilot's success" *Radio New Zealand* (14 August 2019); Press release, Judge John Walker, Acting Chief District Court Judge <http://www.districtcourts.govt.nz/media-information/media-releases/14-august-2019/>
  - 20 Sally Murphy and Lois Williams "New court to hear sexual violence cases" *Radio New Zealand* (25 October 2019).
  - 21 Note that the Judicial Research Committee considered the study outside its auspices as it does not involve itself in research that is only concerned with access to court files.

Applications to access the case files were made under the District Court (Access to Court Documents) Rules 2017. For those cases in which permission to access was granted, a similar process of reviewing the court files and making further selection decisions based on the research criteria was followed. Some of the cases were not selected due to the nature of the relationship between the complainant and defendant being one of intimate partnership, the trial being discharged before completion, or the involvement of multiple complainants or defendants in the case.

Ten trials were identified as meeting the research criteria and are included in the pilot study.

### Ethical considerations

In Aotearoa New Zealand the court is closed to the public when complainants give evidence in sexual cases.<sup>22</sup> The rule responds to the historical experience of complainants having to describe their experience of being sexually violated in detail in a public venue, which complainants attributed to being akin to a second rape. Closure of the court was intended to go some way toward respecting the privacy and dignity of complainants.<sup>23</sup> Yet it also reduces public scrutiny of how rape trials manifest and researchers' ability to build in-depth analyses of what happens in court and how that causes complainants so much distress. Despite increased support for victims going to court in the last decade, interview-based research consistently confirms that rape complainants find giving evidence traumatising and that cross-examination is its worst aspect.<sup>24</sup> In this context, examination of trial materials, especially transcripts of cross-examination, becomes essential to reform driven research with victim well-being at its core.

However, as Elaine Craig illuminates in the excerpt below, this poses further dilemmas; whether (and how) to seek complainants' consent to use the transcripts and how to uphold their privacy and dignity when describing the contents:<sup>25</sup>

*[T]he attribute that makes these transcripts a critical access point to examining the process of a sexual assault trial also poses an ethical problem. The transcripts capture the words of individuals. They record stories of trauma, violence, pain,*

22 Section 199 of the Criminal Procedure Act 2011 provides that the Court must be cleared when the complainant gives evidence in cases of a sexual nature.

23 Warren Young *Rape Study Volume 1: A discussion of law and practice* (Department of Justice, Wellington, 1983) at 126–128. See also Gerald Orchard “Sexual Violation: The Rape Law Reform Legislation” (1986) 12 *New Zealand Universities Law Review* 97 at 107.

24 Rebecca Parkes “The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System” (PhD thesis, University of Auckland, 2017); Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 79; Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 95–96.

25 Elaine Craig “The Inhospitable Court” (2016) 66 *University of Toronto Law Journal* 197 at 202.

*and suffering. As lawyers, judges, and academics we examine, analyse, argue, and write about other people's painful experiences – about some of the worst moments in their lives – and we often do so without their consent ... Absent abandoning the attempt to study these trials ... there is no obvious solution to this ethical issue. It is nevertheless important to be attuned to the reality that this study of the trial experiences of these ... women ... is undertaken without their consent.*

To build a robust analysis of current trial process, this research needed to be based on a substantial number of trials that took place within a relatively limited time frame. An open call to victims/survivors to consent to the use of their transcripts of evidence was clearly not viable. Identifying cases and then approaching the complainants for consent to use the transcript and audio recording of their evidence was considered. In the end, though, this approach was rejected for ethical reasons. In particular, initiating contact with victims/survivors who had already endured the length of time from reporting the offence to completion of trial, and were now unlikely to be interacting with the criminal justice system, was considered potentially harmful. Discussions with victim advocates confirmed that little can effectively be done to reduce the possibility of distress or difficulty from unsolicited contact with women for whom the trial process is complete. However, our experience and advice assured us that many victims/survivors who have endured the trial process do support research aimed at reforming those processes, even if they do not want their lives disrupted in order to personally participate.

It was decided that the preferable approach, in the context of the aims of this research, was to enact safeguards over the use of the material to limit the potential for harm to a particular complainant. These were considered from a range of perspectives including: victim advocates, who contributed a survivor-centric approach; the Chief High Court Judge and Chief District Court Judge, who were consulted on appropriate constraints under the Criminal Procedure Rules 2012 or the District Court (Access to Court Documents) Rules 2017 (as applicable); and, the Human Ethics Committees of Victoria University of Wellington and University of Canterbury, who granted ethics approval following an assessment process. Both universities contributed dedicated IT support and advice regarding the safe storage of highly sensitive material.

The safeguards included anonymising the case materials at the earliest opportunity. This included all references to the complainants' personally identifying information, information specific to the incident such as location, and identifying information about witnesses and the defendant. Counsel and judiciary were also referred to by role only in order to protect complainant confidentiality and because individual professional practice is not the focus of the study. Tasks were distributed among the research team members so as to minimise researcher exposure to original information. Original case materials were carefully protected including ensuring they were not emailed or stored on internationally backed-up servers. They have been kept separately from the fully anonymised documents that have been the working material for both studies.

Ethical concerns did not, however, end with the production of anonymised case materials. At a number of points in the research there have been dilemmas regarding the best approach to working with this sensitive material. Use of the audio recordings to annotate transcripts of the complainants' evidence (described below), exposed a small group of researchers to much intense emotional expression over a condensed period of time with a limited number of people to talk with about that experience.

An unanticipated impact of anonymisation has been the creation of somewhat generic versions of events in working materials and this book, when reporting on the specific social and cultural context of those events would have felt more respectful of the complainants' experiences. Further, in presenting a legal analysis based on these cases, it has been challenging to balance the level of detail and specificity needed to demonstrate a problem in its applied context with maintenance of complainant confidentiality and privacy.

Of particular concern has been the representation of Māori women as complainants in the studies. Māori women are consistently over-represented as victims of sexual violence in New Zealand and there is no reason to expect that this is different in these studies.<sup>26</sup> However, with incomplete information about complainant ethnicity, correlations or claims about complainant ethnicity and factors such as their treatment in the courtroom cannot be made based on these comparative studies. At the same time, as Pākehā researchers who have worked alongside Māori to end sexual violence, we recognised the particularities of Māori women's experiences in the contexts of the cases and in the additional burdens of being complainant witnesses in a colonial criminal justice system. Māori advocates and researchers were consulted at various points in the research, including when we grappled with whether and how to represent these issues. It was agreed that our speculation about Māori women's experience of sexual offending trials (beyond what is embedded in the analysis that follows) would not be helpful in this context. What is necessary is kaupapa Māori research<sup>27</sup> that makes use of trial analysis to unpack the specificities of how Māori women are positioned and treated as complainants in rape trials.<sup>28</sup>

We have aimed to protect complainant confidentiality and be respectful of the painful experiences captured in the trial records with which we have been entrusted. Complete anonymity is not possible in an empirical analysis of a justice process – it is likely that some complainants and some trial participants will recognise our description and analysis of the trials. However, it is our intention and hope that our representations of the trials and the

26 Ministry of Justice *New Zealand Crime and Victims Survey: Key findings* (Ministry of Justice, Wellington, 2018) at 82; Sue Triggs and others *Responding to sexual violence: attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, 2009) at 17 and 23; *New Zealand Crimes and Victims Survey 2018 Topical report: An overview of important findings* (Ministry of Justice, Wellington, 2019) at 8 <https://www.justice.govt.nz/assets/Documents/Publications/NZCVS-topical-report-Important-findings-Cycle-1-2018-v1.1-fn.pdf>

27 An approach to research that embodies Māori principles and world view.

28 See further Chapter One at 11.



evidence that was given in them appropriately balance complainant confidentiality and dignity with the pressing need to improve the process that harms so many of them.

### **The case materials and how they were used in the studies**

In each case in both studies, permission to access trial records was granted in relation to the audio recordings and Notes of Evidence (NOE) of the complainants' testimony, pre-trial or at trial judicial decisions related to the complainants' evidence, closing statements by counsel and the judge's directions to the jury. In addition, access to the physical court file enabled the researchers to gather information that would not be captured in these records – for instance, the outcome of the trial.

Access to the audio recordings of the complainant's evidence is a unique aspect of this research. Research analysing transcripts of questioning has demonstrated some of the oppressive qualities of cross-examination in rape trials.<sup>29</sup> An aim of this research is to develop a deeper understanding of the relationship between the content and style of questioning and complainant distress. Opponents of reform to rape trial conduct have suggested that the distress that complainants report as a consequence of trial is inevitable given the subject matter. But this response hides issues of degree and causation. To what extent do questions that rely on rape myth impact on complainants' experience of giving evidence? Is it possible to limit practices that lead to unnecessary distress for complainant witnesses?

In order to investigate how a complainant responds to questioning as it occurs, the audio recordings were used to augment the transcripts of evidence with the verbal and non-verbal expressions that were not already recorded. All audible expressions by the complainants were annotated on to the transcripts. This included vocal paralinguistic features such as a pronounced change in volume, pitch or speed of speech; sounds made by the complainants such as crying, coughing or laughing; and utterances made by the complainants such as talking to themselves. Pronounced pauses and silences were also recorded.

In the analytic phase sustained or prominent episodes of heightened expression were coded together with the line of questioning that preceded or contained that episode. In this phase, spoken expressions of heightened emotion already on the transcript – for instance requests for a break from giving evidence due to being emotionally overwhelmed – were also coded. These excerpts were used to identify patterns in the relation between questioning content

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29 See for instance Nina Westera and others "Sexual Assault Complainants on the Stand: A historical comparison of courtroom questioning" (2017) 23 *Psychology, Crime & Law* 15; Sarah Zydervelt and others "Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?" (2016) 57 *British Journal of Criminology* 551; Mark Kebbell, Steven Deprez and Graham Wagstaff "The Direct and Cross-examination of Complainants and Defendants in Rape Trials: A qualitative analysis of question type" (2003) 9 *Psychology, Crime & Law* 49.



or style and heightened emotionality in complainants. Often that expression could be interpreted as indicating negative emotion or distress, such as crying, but expression that could more readily be interpreted as resistance, for example sarcasm or noticeably raised volume, was also captured. Some episodes of complainant expression were not readily interpretable – such as periods of silence – but if they seemed to indicate emotional conflict they were also coded.

Like transcripts, audio recordings do not give unfettered access to the subjective experiences of the women who gave evidence in these trials.<sup>30</sup> Rather, they are “socially produced record[s] of a process” then interpreted by socially located researchers.<sup>31</sup> Two aspects of this partiality were particularly apparent in this method of analysis. Firstly, there was considerable range in the expressiveness between complainants, with some complainants being highly expressive for much of the time they were being questioned, others who expressed heightened emotionality episodically and some women who used minimal audible expression or demonstrated flat affect. Secondly, ethnic and cultural differences in emotional experience and expression were not able to be taken account of. Further research using culturally diverse methodologies, especially kaupapa Māori, is needed in order to develop culturally responsive reform of law and practice in this area.

The audio recordings were also used to capture interactions with the complainant such as communication between the complainant and the judge or counsel that was not transcribed (as this interaction is not part of the evidence), and notable auditory features of judicial or counsel questioning of the complainant. From these we hoped to learn how complainants are treated and responded to during their time in the courtroom. Other discussions about trial process or the complainants’ evidence were also transcribed, including those occurring in the absence of the jury. These discussions included arguments and decisions regarding the admissibility of evidence and judicial and counsel interventions in the questioning process. This aspect of audio annotation generated substantial material illustrating the everyday application of the rules of evidence in rape trials, which is not otherwise available to researchers.

### The methods of analysis

To analyse the case materials, all of the trial documents – the annotated transcripts of complainant evidence, records of evidential argument and rulings, closing statements to the

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30 See for discussion Elizabeth Sheehy *Defending Battered Women on Trial: Lessons from the transcripts* (UBC Press, Vancouver, 2014) and Emma Cunliffe “Untold Stories or Miraculous Mirrors? The Possibilities of a Text-Based Understanding of Socio-Legal Transcript Research” (2013) Social Science Research Network [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2227069](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227069)

31 Emma Cunliffe “Untold Stories or Miraculous Mirrors? The Possibilities of a Text-Based Understanding of Socio-Legal Transcript Research” (2013) Social Science Research Network [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2227069](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227069) at 8.

jury by counsel and jury directions – were coded in NVivo. The transcripts of complainant testimony were coded across four aspects: trial conduct; rape mythology; evidential issues; and the questioning process. Trial conduct included coding for complainant expression, trial management by the judge, such as managing the courtroom or intervening in questioning, and all objections and interventions from counsel. Coding for rape mythology involved developing a codebook, drawing on Jennifer Temkin’s article on rape myths in the courtroom,<sup>32</sup> and the Rape Myths Acceptance Scale.<sup>33</sup>

Question and answer sequences from evidence in chief, cross-examination and re-examination were allocated a rape myth code where it was assessed that the myth was demonstrated, inferred or indicated. For example, the question “You didn’t tell anyone, did you, because it wasn’t really rape?” was coded as “real victims complain immediately”. Rape myths were not just the direct basis of questions in cross-examination, they were also observed in prosecutor questions that forestalled rape myth meaning-making – such as “why did you not tell anyone what happened immediately?” – and in complainants offering additional information or explanation where rape myths could be implied, for instance offering that: “I didn’t tell anyone straight away because I was confused and scared”. These were also coded where the context indicated meaning-making about rape and rape victims was occurring.

Coding of the questioning process involved coding for notable features in questioning format, tone or style, both in terms of pattern and exception. It included codes for features such as sudden changes of topic, extended sequences or repeated questioning on a particular matter, and unusual uses of language. Evidential codes were identified by reference to the Evidence Act 2006, particularly its provisions that only or mostly apply to sexual offence cases. Coding for evidential issues included coding pre-trial decisions, sections in the transcript where admissibility or witness questioning rules were at issue, minutes and rulings by the judge, admissibility issues, and any evidential matters discussed in the absence of the jury. Transcript coding was conducted by two researchers and included comparison and consistency checking processes. After the first five, and then 15, transcripts were coded, reports were produced and reviewed for consistency and definitional boundaries, and the codebook was updated and some excerpts recoded.

Characterisations of rape and rape victims are especially prevalent when the parties are summarising their case immediately prior to jury deliberations, so the prosecution and defence closing arguments to the jury were coded for rape myths using the same coding

32 Jennifer Temkin “‘And always keep a-hold of nurse, for fear of finding something worse’: Challenging rape myths in the courtroom” (2010) 13 *New Criminal Law Review* 710. See further the discussion in Chapter Three.

33 Diana Payne, Kimberly Lonsway and Louise Fitzgerald “Rape Myth Acceptance: Exploration of its structure and its measurement using the Illinois Rape Myth Acceptance Scale” (1999) 33 *Journal of Research in Personality* 27; Sarah McMahon and G Lawrence Farmer “An Updated Measure for Assessing Subtle Rape Myths” (2011) 35 *Social Work Research* 71.

scheme as for the transcripts of evidence. However, for these documents, additional codes in relation to consent were added to track how consent was defined by counsel and what facts or claims were used to support arguments for or against consent or belief in consent. The judges' directions to the jury (summings-up) were also coded for rape mythology and definitions of consent, but with a particular focus on judicial responses to reliance on rape myths by counsel; for instance, whether use was made of available directions that counter rape myths.

Once all documents were coded, reports were produced and reviewed for consistency and analysed for pattern, range and exception. Memos were kept of patterns across cases and notable features of particular cases. Lastly, all of the documents were read by the author of this book for each case in their entirety, for familiarity with the progression and conduct of each case and to check for any arising evidential issues that did not result in an objection or ruling during the trial.

### ***The cases in the studies: fact and trial characteristics***

The study criteria and practical factors associated with the case identification process mean the collection of cases in these two studies are neither representative nor random. However, they do all share the parameters set for the study and all cases that met the criteria were included. As such, the cases offer a snapshot of contemporary adult acquaintance rape trials taking place in Aotearoa New Zealand District Courts.<sup>34</sup>

A summary of each trial including the participants' claims about what occurred, the charges and trial outcomes can be found in Appendix One. In this chapter, the cases as a group are described in relation to what we know about the demographic characteristics of the complainants and the factual context of the cases, and also in relation to trial features. Permission to access trial materials was granted in relation to the complainants' evidence, so equivalent demographic information about the defendant is not provided. This information has been derived from case files or trial materials. Where information was not available for all cases this is indicated and percentages exclude missing information.

### **The factual context of the cases in the principal study**

The 30 cases in the principal study come from a wide range of community and social settings. Trials were sourced from seven locations; five in the North Island and two in the South Island and include a mix of courts in large urban areas and provincial cities. Twenty-eight of the cases were heard in the District Court, the other two in the High Court. Some of the trials heard in provincial District Courts were ones in which the events occurred in a rural

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34 The principal study also includes two High Court cases.

community serviced by a city court. The trials occurred between March 2010 and September 2015 and all relate to recent rather than historical offending; that is, the alleged offending had occurred no more than six months prior to it being reported to the police.<sup>35</sup>

Due to the selection process, all of the complainants were female.<sup>36</sup> This is consistent with adult sexual assault charging patterns in which women are much more likely to be the victims. For instance, in 2018, 1,295 sexual offending charges were for offences against adult females and 69 sexual offending charges involved adult male victims.<sup>37</sup> Similarly, all defendants were male due to the study selection criteria. This dynamic is also consistent with adult sexual violence charging and conviction patterns.<sup>38</sup>

Information about the complainants' ages at the time of trial was available in 27 of the cases. They ranged in age between 17 and 51 years old. However, 20 (74%) of the complainants were aged 25 years or under, with seven (26%) under the age of 20, so the median age is 22 years.

Age of complainant at trial			Principal research (n=27)	
17–19 years	20–24 years	25–35 years	35 years+	Median age
7 (26%)	10 (37%)	7 (26%)	3 (11%)	22 years

A high proportion of young adult victims is typical of sexual assaults by people who are neither family nor intimate partners.<sup>39</sup> This has been attributed to the greater proportion of time that many young adults spend in social environments.<sup>40</sup> The vulnerabilities associated

35 Note that in one case the alleged offending had occurred over a period of six months, and the sexual violation by rape charge was representative. Complaint to the police was made within one month of the end of that six-month period.

36 Police data collection methods use the gender categories of female and male. The female category could therefore include trans women. However, none of the case materials in the studies contained information suggesting that was the case, so it seems likely that all of the women in the study were cisgender female.

37 Ministry of Justice *Sexual-offences-data 2018* at Table 3a <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#offence> see also *New Zealand Crimes and Victims Survey 2018 Topical report: An overview of important findings* (Ministry of Justice, Wellington, 2019) <https://www.justice.govt.nz/assets/Documents/Publications/NZCVS-topical-report-Important-findings-Cycle-1-2018-v1.1-fin.pdf>

38 Ministry of Justice *Sexual-offences-data 2018* at Table 6a <https://www.justice.govt.nz/justice-sector-policy/research-data/justice-statistics/data-tables/#offence>

39 Ministry of Justice *New Zealand Crime and Victims Survey: Key findings* (Ministry of Justice, Wellington, 2018) at 77; Sue Triggs and others *Responding to sexual violence: attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, 2009) at 16.

40 Haley Clark and Antonia Quadrara *Insights into Sexual Assault Perpetration: Giving voice to victim/survivors' knowledge* (Australian Institute of Family Studies, Research Report No. 18, 2010); Bianca Fileborn "Sex and the City: Exploring young women's perceptions and experiences of unwanted sexual attention in licensed venues" (2012) 24 *Current Issues in Criminal Justice* 241.

with youth, including socialising environments and high levels of alcohol consumption, are a striking feature of the cases in this research.

As described above, cases were initially selected for the study based on a range of criteria intended to identify cases that aligned with an acquaintance rape scenario. The defining criteria were cases involving a sexual violation by rape charge, a single adult female complainant and a single adult male defendant who did not have a close kin relationship or was in an intimate partnership with the complainant, and cases in which consent was the issue at trial. As might be expected, some of the cases occurred in a context of dating or recent consensual sexual activity (n=3; 10%) and others involved established friendships or situations in which the defendant and complainant were known to each other through a broader social group (n=8; 27%). In seven (23%) of the cases, the complainant and defendant were known to each other through their employment; four as fellow employees and three cases in which the defendant was an employer or client. In the other 12 cases (40%), the prior acquaintance of the complainant and defendant was limited. In seven cases they had had limited previous social contact or had only met online, and in five cases they were not known to each other before the events which resulted in the complaint being laid.

Many of the cases involved the consumption of alcohol. In 21 of the 30 cases, the complainant gave evidence that she had consumed alcohol prior to the alleged rape. In nine trials, the complainant had either gone to, or been put to, bed after drinking when the sexual activity occurred. In seven of those cases, the complainant was woken by the defendant's action and with limited memory of the previous events. In another two cases the complainant gave evidence of being extremely intoxicated in a public place and of memory loss of the events.<sup>41</sup>

Research has highlighted the relatively high proportion of victims of sexual assault who suffer some form of mental, physical or social vulnerability.<sup>42</sup> In the principal study, two of the women had physical impairments that impacted on the conduct of the trial or the events at issue, and three had cognitive or learning challenges that were mentioned, or became apparent, during trial. Two complainants needed English language translation services when engaging with the criminal justice system. Many complainants disclosed, during questioning, current or past struggles with mood disorders, including depression, anxiety and self-harming behaviour.

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41 See further Chapter Seven at 255.

42 Andy Feist and others *Investigating and Detecting Recorded Offences of Rape* (Research Development and Statistics Directorate, Home Office, Online Report 18/07, July 2007); Melanie Heenan and Suellen Murray *Study of Reported Rapes in Victoria 2000–2003: Summary research report* (Office of Women's Policy, Department for Victorian Communities, Melbourne, 2006); Sue Triggs and others *Responding to sexual violence: attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, 2009) at 20; Hamid Khalifeh and others "Domestic and sexual violence against patients with severe mental illness" (2015) 45 *Psychological Medicine* 875.

The relative youth of the complainants was associated with a range of social vulnerabilities, including being assaulted by men in positions of authority over them by virtue of employment, pastoral or senior status. Other indicators of social vulnerability included lack of mobile phone credit to call for assistance, lack of money to get a taxi away from the location where the events happened, and in some cases a lack of alternative places to go to away from the alleged offender. Many of the young women were living in shared or temporary accommodation. Social media was sometimes a source of assistance – for instance, it enabled some women to communicate with friends when they had no money; but text and messaging data was often used to challenge their evidence. The contested meanings made of social media communication were one example of the gap between the realities of young women’s lives and the normative framing of the “real [adult, serious, proper] world” of the courtroom against which their behaviour was judged and which represents another aspect of their vulnerability in relation to experiencing and reporting sexual assault.<sup>43</sup>

### The factual context of the cases in the pilot study

The pilot study comprises 10 trials which were selected according to the same criteria as the principal study. The trials were held between late 2017 and the end of 2018. The complainants in this group of cases were aged between 18 and 39 years at trial, with the median age being 23 years.

Age of complainant		Pilot study (n=10)		
17–19 years	20–24 years	25–35 years	35 years+	Median age
2	4	3	1	23 years

The factual circumstances of the Pilot cases are remarkably consistent. In seven of the cases the complainant and defendant had met very recently or had minimal previous contact. In four of these cases they met for the first time on the day of the alleged rape; in the other three cases the complainant and defendant had had limited social group contact. Three cases involved pre-existing friendships. In none of the Pilot cases had the complainant previously dated or been in an intimate sexual relationship with the defendant.

In all of the Pilot cases, the preceding events involved consumption of alcohol in the context of socialising or celebrating. In eight cases the complainant said she was asleep and intoxicated during or after the social event, having gone to bed or been put to bed, and in seven of these cases she was awoken by the defendant raping her. In one other case the complainant had gone to sleep, after a night out during which she was drinking, and woken up to find the defendant in bed with her. In the final case, the complainant had been drinking

43 See Chapter Four at 84.

while out socialising, was helped to travel home by taxi, but had only limited memory of the events.<sup>44</sup> Therefore, the vulnerabilities of youth, socialising environments and high levels of alcohol consumption are even more strikingly evident in the pilot study than in the principal study. Other forms of social vulnerability to sexual assault were evident in the complainants' circumstances noted in the pilot study, including limited English language proficiency and the fact that several of them were living in shared or temporary accommodation. In two cases the ethno-cultural identity of the complainant was specifically relevant to the events in question or to the questioning at trial.

### **Trial features in the principal study**

All of the cases included at least one sexual violation by rape charge. Twenty-one (70%) of the trials involved more than one charge, many of which were other sex crimes, such as unlawful sexual connection or indecent assault. In 17 cases (57%) the defendant was also charged with at least one count of sexual violation by unlawful sexual connection (including three attempt charges). These included 12 digital-genital and 11 oral-genital sexual connection-related charges and seven charges involving penetration of the complainant's anus by a body part or object. Two of the cases included other violence charges that were not also sex crimes. Both of these cases were heard in the High Court.

On average, complainants spent four hours giving evidence;<sup>45</sup> the range was between one hour and 18 minutes and nine hours. The average length of time of evidence in chief was 109 minutes (one hour 49 minutes) and ranged from 20 minutes to five hours and 19 minutes. Time being cross-examined ranged from 30 minutes to five hours and 29 minutes, with the average being 116 minutes (just under two hours). Re-examination tended to be relatively short with the average length of time being 15 minutes, and the longest 47 minutes.

Most of the complainants in the principal research used at least one alternative way of giving evidence. In the principal research, 18 of the 30 complainants had a screen that prevented them from seeing the defendant while they gave their evidence in court. One complainant gave oral evidence via closed-circuit television (CCTV) from a room in the courthouse and another through audio-visual link from a remote location. In 10 trials, the evidential video interview (EVI) was shown as part of the complainant's evidence in chief. Eight of these were in cases in which the complainant was also screened from the defendant. In another case the complainant appeared by audio-visual link. In one case the (EVI) was the only alternative way used. Therefore, in the principal study, 21 complainants had use of at least one alternative way of giving evidence (70%) and nine complainants gave evidence in the ordinary way.

44 See further Chapter Seven at 255.

45 The time counted was from being called to being excused, but did not include the lunch or overnight adjournments; however, morning and afternoon and unscheduled adjournments were counted.

Ways of giving evidence		Principal study (n=30)		
EVI	Screen	Video link or CCTV	EVI & screen or video link/CCTV	Ordinary
10 (33%)	18 (60%)	2 (7%)	9 (30%)	9 (30%)

At least 21 of the complainants in the principal study had a support person with them in court.<sup>46</sup> In *Kingsford*, the complainant arrived at court with a support person, having previously indicated that she would not be using one. This caused some difficulty, including the support person apparently touching the complainant while she was giving oral evidence, and then being instructed not to by the prosecutor.<sup>47</sup>

Defendants gave evidence in person in 20 trials. In 21 trials the defendant's video recorded statement to the police was offered in evidence by the Crown. In two cases the defendant exercised his right to silence pre-trial and at trial.

Principal study n=30	Pre-trial statement admitted	No pre-trial statement admitted
D gave evidence at trial = 20	13	7
D did not give evidence at trial = 10	8	2

Across the 30 trials, four judges were women. Complainants were questioned by female prosecutors in 13 trials and by female defence counsel in four trials. There were no trials in which the judge and both the lawyers who questioned the complainant were all female;

<sup>46</sup> Five complainants did not have a support person; in four cases we were unable to be sure that the lack of reference to a support person on any documentation conclusively indicated that there was no support person. Complainants are entitled to have a support person with them when they are giving evidence (section 79(1) of the Evidence Act 2006). The entitlement is intended to assist the witness to give their best and complete evidence by reducing stress and providing comfort. It exists regardless of which way of giving evidence is being used. Support is provided by the person's presence, and the person is not permitted to prompt or advise the complainant while she is giving evidence, as that may influence the content of her evidence. Judges have the power to give directions regulating the support person's actions and this may be used to ensure that the presence or actions of the support person do not cause the jury to draw negative inferences about the defendant: *R v AGR (No 1)* HC Auckland CRI-2006-092-011084, 2 November 2007.

<sup>47</sup> Support persons are often advised that they may not touch the complainant while she is giving evidence, including to provide physical comfort to distressed complainants. The concern is that such actions may influence the jury's perception of the complainant's credibility or the defendant's guilt. However, survivor advocates in Aotearoa New Zealand are currently pressing for the "no touching" rule to be relaxed and for the support person to be able to be seated within view of the witness: *Workshop Playback Report* (2019) <https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/6dhd38-Criminal-Justice-Victims-workshop-playback-report.pdf> at 18.



however, in 11 trials both questioning counsel and the judge were male. Jurors were relatively equally represented by gender with 181 male jurors and 177 female jurors appointed to the 30 trials.<sup>48</sup> However, in 21 of the 29 juries (73%), for which we know the gender of the foreperson, the foreperson was a man. This gender imbalance in forepersons is consistent with jury research, which has also demonstrated that forepersons are likely to spend more time speaking in the jury room, have more power in determining the processes of deliberation, have disproportionate influence on deliberations and exert greater control over decision-making.<sup>49</sup>

The outcomes at trial on the sexual violation by rape charges was 12 guilty (40%), one hung jury and 17 not guilty (57%). In 11 of the 21 cases (52%) in which there were charges additional to the sexual violation by rape charge, the defendant was found guilty on at least one other charge. In three of those cases the defendant was acquitted on the rape charge.

Juries deliberated for between 30 minutes and 12 and a half hours, with the average time being just under four and a half hours. Of the 12 cases in which the defendant was sentenced on the sexual violation by rape charge,<sup>50</sup> sentences ranged from four years and two months imprisonment to preventative detention.<sup>51</sup> Of the 11 finite sentences, the average period of imprisonment was seven years and seven months. There was one case in which the defendant was found guilty on an unlawful sexual connection but not the rape charge; he was sentenced to five years imprisonment.

The defendant appealed his conviction in nine of the 12 cases in which there was a guilty verdict on the sexual violation by rape charge.<sup>52</sup> One appeal was successful (on the grounds of trial counsel error) and a retrial ordered; however, the Crown offered no evidence for a second trial, so the defendant was discharged. The grounds of appeal in relation to conviction included four instances in which it was argued that evidence was improperly excluded or admitted; four cases in which defence counsel incompetence was argued; two

48 Two juries had a single juror excused during the trial. There is a margin of error in juror gender attribution because we assigned gender categories based on name information.

49 See for instance Traci Feller "One Voice Among Many: Forepersons, juries and the importance of communication" (PhD thesis, University of Washington, 2017); Traci Feller "What the Literature Tells Us About the Jury Foreperson" (2010) 22 *The Jury Expert* 42; Louise Ellison and Vanessa E Munro "Getting to (Not) Guilty: Examining jurors' deliberative processes in, and beyond, the context of a mock rape trial" (2010) 30 *Legal Studies* 74; Elisabeth McDonald "A Jury of Her Silent Peers" (1993) 9 *Women's Studies Journal* 88.

50 The maximum sentence for sexual violation by rape or unlawful sexual connection is 20 years imprisonment; section 128B of the Crimes Act 1961. A sentence of preventative detention may be imposed on adult offenders if they are convicted of a qualifying sexual or violence offence and the court is satisfied that the person is likely to commit another qualifying sexual or violence offence if the person is released at the sentence expiry date: section 87 of the Sentencing Act 2002.

51 With a minimum period of detention of nine years and four months imprisonment.

52 See further Appendix One.

cases in which judicial error was claimed and one case arguing prosecutorial misconduct (all were unsuccessful).<sup>53</sup> One defendant appealed his sentence but this was not successful.

### Trial features of the cases in the pilot study

Each of the Pilot cases included a single charge of sexual violation by rape. In six of the 10 cases there were additional charges. In four cases there were unlawful sexual connection charges involving four digital-genital sexual connection charges and one charge involving penetration of the complainant's anus by a body part or object. Two cases included a charge of indecent assault.

The length of time complainants spent giving evidence in the Pilot cases was similar to that of the principal study. Time in court ranged from one hour and 16 minutes to eight hours and eight minutes, with an average of just under four hours. The average length of time of evidence in chief was 116 minutes (one hour and 56 minutes). Time in cross-examination ranged from 19 minutes to four hours and 39 minutes, with the average being just under two hours. The average length of re-examination was 11 minutes, and the longest 34 minutes.

Complainants in the pilot study had a higher level of support for giving evidence. All of the women used an alternative mode of evidence. Five complainants were screened from seeing the defendant and five gave oral evidence via CCTV from within the courthouse. An EVI was used in four trials. Three of these were trials in which the complainant gave her oral evidence by CCTV. In the other case in which the EVI was played, the complainant also had a screen. Two of the 10 complainants in the pilot study were child complainants and this entitled them to give evidence using one or more alternative ways.<sup>54</sup> Both child complainants (those under 18 at the time the proceedings commenced) gave oral evidence by CCTV. In one of those cases their EVI was played as part of their evidence in chief.

Ways of giving evidence		Principal study (n=10)		
EVI	Screen	Video link or CCTV	EVI & screen or video link/CCTV	Ordinary
4 (40%)	5 (50%)	5 (50%)	4 (40%)	0

53 Some appeals included more than one ground, so the number of grounds is greater than the number of appeals.

54 From 8 January 2018, complainants aged under 18 when proceedings are commenced are classified as child complainants for the purposes of alternative ways of giving evidence. Child complainants are entitled to give evidence in one or more alternative ways; see sections 107–107B of the Evidence Act 2006. Note that the criteria for this research was adult complainants. However, the use of police charging data to locate cases in the principal study and the criteria for the Sexual Violence Court Pilot meant that some cases selected for these studies involve a 17-year-old complainant.

In the pilot study, nine of the 10 complainants had a support person with them. In one case, the support person – a family member – took a somewhat more proactive role than is usual, asking for a break when the complainant became highly emotional during cross-examination.

All of the 10 Pilot trials were presided over by male judges and all defence counsel who questioned the complainant were male. Eight of the questioning prosecutors were female. In five of the nine trials (56%) in which the gender of the jury foreperson is known, there was a male foreperson.

In seven trials the defendant gave evidence in person. In four trials the defendant's video recorded statement to the police was played as part of the Crown's evidence. In only one case did the defendant exercise his right to silence pre-trial and at trial.

Principal study n=10	Pre-trial statement admitted	No pre-trial statement admitted
D gave evidence at trial = 7	2	5
D did not give evidence at trial = 3	2	1

Three defendants (30%) were found guilty on sexual violation by rape charges and seven (70%) were acquitted. None of the other charges in the Pilot cases resulted in a guilty verdict. Sentences ranged between five years and two months and seven years and eight months imprisonment. One defendant appealed his conviction, on the ground that prejudicial evidence had been incorrectly admitted during trial, and this was successful with a retrial ordered.

### ***Concluding observations***

The 40 cases in the principal and pilot studies provide a snapshot of contemporary adult rape trials in New Zealand courts. They each involve an adult female complainant of rape and a male defendant. The range of personal characteristics of the complainants such as age, where available, reflects what is known about adult rape from victim surveys and attrition studies. The types of social circumstances and of complainant vulnerabilities are also consistent with research that has investigated to whom and in what context hetero-gendered adult sexual violence is most likely to occur. The cases are taken from seven locales throughout Aotearoa New Zealand, mostly from District Courts, but including two cases heard in a High Court. The outcomes of the trials are also typical of adult sexual violation cases that proceed to trial and result in a verdict.

One aspect of the group of cases that is noticeably at odds with typical knowledge about adult rape is that the definitional line between stranger rape and acquaintance rape is not readily apparent. The identification and selection criteria for the studies sought to eliminate stranger rape cases by focussing on cases in which consent or reasonable belief in consent was the principal fact in issue. This was intended to exclude the “stranger in the bushes” scenario that is paradigmatic of stranger rape cases. Cases in which the principal line of defence was a denial of penetration were also excluded and at least some of these were analogous to stranger rape.

Nevertheless, in five cases in the principal study and four cases in the pilot study there was no pre-existing relationship, social acquaintance or previous contact between the complainant and defendant before the events in question. In another seven cases in the principal study and three cases in the pilot study, the complainant and defendant had had minimal previous social contact. In all of these 19 cases, the existence of consent or reasonable belief in consent was argued by the defence, and in some cases this was successful. These gradations demonstrate that the typical formulation of acquaintance rape as a definitional category – that the people in question are “known” to each other – fails to recognise that this is a contingent notion in a cultural context in which consensual casual sex between strangers is readily invoked in the courtroom. Arguably, even in cases where there is no substantial acquaintance between the complainant and defendant, consent can be raised, precisely because of the saturation of rape mythology within the social imaginary and the courtroom.

Finally, the audio recordings of the complainants’ testimony are the unique, and especially sensitive, aspect of this research. As the balance of this book will demonstrate, the research has yielded a wealth of new and illuminating material that sheds light on the ways in which rape trials affect the complainant’s experience. In particular, it has enabled us to analyse complainant expression and emotionality and connections to the types of questions being put, or the tone and pattern of questioning; how judges interact with complainants and how they manage and respond to potentially problematic questions during testimony; the impact of courtroom constraints on complainants; and admissibility rulings. It is our hope that the analyses and arguments that follow support law reform that will improve the experience of adult rape complainants during the trial process.

## CHAPTER THREE

## RESEARCH FOCUSING ON RAPE MYTHS: EXPOSING OR REINFORCING?

*Simply put, lawyers and judges who practise and adjudicate in ways that rely upon rape mythology cause real harm – both by shaming individual complainants and by contributing to a social context in which fear of the legal process and feelings of shame and self-blame mean that men can sexually violate women (and children) with almost complete legal impunity. Given that revisions to the rules of evidence and the law of sexual assault have legally rejected many of these gendered stereotypes about sexual violence, continued use of and reliance upon them by lawyers and judges represents one example of a harm to sexual assault survivors that is both caused by legal professionals and avoidable.<sup>1</sup>*

**Overview: opening the courtroom door**

The motivation for this research was to investigate the possible reasons why adult rape complainants' reported experience of giving evidence has not altered over many years, despite many changes to law and practice aimed at lessening the negative impact of the questioning process. Existing research, examined at the start of this project, suggested that complainants most impacted by giving evidence, especially under cross-examination, were involved in cases in which the issue at trial was consent and where they knew the defendant in some way.<sup>2</sup> In such cases, the research demonstrated that it was more likely that evidence of the complainants' sexual experience would be admitted, despite specific exclusionary rules,<sup>3</sup> and deployment of rape myths would be more common.

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- 1 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018) at 17.
  - 2 See further Chapter One.
  - 3 See further Chapter Five.

The research also indicated that reliance on rape mythology as part of the questioning process, predominantly for the purpose of challenging the complainants' credibility,<sup>4</sup> resulted in heightened levels of complainant distress. Such distress, we believe, impedes the ability of a complainant to give the best evidence, makes her feel that **she** is on trial,<sup>5</sup> and limits the amount of relevant and reliable information available to the jury. One of the aims of this research was, therefore, to explore the impact that the use of rape myths in questioning has on the effective engagement of the complainant, and the extent to which such use increases heightened emotionality or distress.

While we predicted, consistent with other findings based on analysis of smaller numbers of cases, that cross-examination based on reinforcement of rape mythology would result in complainants' heightened emotionality,<sup>6</sup> we aimed to demonstrate also that testing a complainant's evidence is possible without reliance on rape myths. Further, our reform proposals rely on public statements and discussions within our consultative process that it is not the aim of cross-examiners to cause unnecessary distress, nor to rely on outdated tropes about expected complainant behaviour.<sup>7</sup>

There has been debate about the extent to which rape mythology really does have implications for the criminal justice process, so as to make such mythology a worthy site of attention by researchers, policy makers and legislatures. There is also a risk in writing about rape myths and exposing the places where rape myths may affect trial outcomes, that such a project may of itself reinforce contestable assumptions and provide a fruitful source for advocates' trial strategy. Our defence of this particular aspect of our methodology is that in exposing the negative impact of the current questioning process, and the extent to which

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- 4 Julia Quilter "Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform" (2011) 35 Australian Feminist Law Journal 23; Susan Ehrlich "Perpetuating – and Resisting – Rape Myths in Trial Discourse" in Elizabeth Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012); Geoffrey Matoesian *Reproducing Rape: Domination through Talk in the Courtroom* (Polity Press, Cambridge, 1993). For more recent research see Olivia Smith and Tina Skinner "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 Social & Legal Studies 441; Olivia Smith *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018); Jennifer Temkin, Jacqueline M Gray and Jastine Barrett "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2016) 22 Feminist Criminology 1.
- 5 Wendy Larcombe "The 'Ideal' Victim v Successful Rape Complainants: Not What You Might Expect" (2002) 10 Feminist Legal Studies 131 at 143; Amanda Konradi *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger Press, Westport, 2007); Patricia Yancey Martin and R Marlene Powell "Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims" (1994) 19 Law and Social Inquiry 853; Alison Young "The waste land of the law, the wordless song of the rape victim" (1998) 22 Melbourne University Law Review 442.
- 6 See Chapter Eight at [328](#).
- 7 However, the research demonstrates that despite some counsel publicly disavowing such reliance, rape myths are regularly and consistently reinforced through the trial process. See also Chapter Seven at [292](#).

rape myths contribute to that impact, we hope to inform the ongoing public debate about the trial process in rape cases. This research opens the courtroom door to demonstrate what actually happens when an adult rape complainant gives evidence. Analysing this process, in part, through the identification of rape myths provides a link between the current public acknowledgement of erroneous beliefs about “real rape” and the criminal justice process.<sup>8</sup> In doing so, we hope to contribute to an informed and positive debate about what still needs to change in order for the trial process to no longer be a factor in the attrition rates of sexual offending.<sup>9</sup>

This book shows the impact of rape myths when relied on in the questioning of the complainant.<sup>10</sup> What this research does not demonstrate is the impact of rape myth on juries and the jury deliberation process. We instead rely on the work of others, which has demonstrated that jurors do rely on rape myth when reaching a verdict,<sup>11</sup> to provide the basis for some of our recommendations. As this research identifies the many points during the trial at which rape myths are reinforced, our empirical research provides support for the current initiatives to increase the use of counter-intuitive evidence, or directions, aimed at providing an alternative narrative to the one based on misconceptions held by jurors. The connection between the subject matter of cross-examination and juror decision-making processes has recently been discussed by Greg Byrne and Chris Maxwell:<sup>12</sup>

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- 8 The current debates, and political engagement, in Aotearoa New Zealand, as elsewhere, are, of course, the culmination of many decades of tireless debate, activism, research and, on occasion, political will. We provide a small snapshot of the lead-up to this research in Chapter One (see [n 3](#)), which gave the issues sufficient public profile to result in funding and institutional support. For Canadian commentary on this point see Melanie Randall “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance and Victim Blaming” (2010) 22 *Canadian Journal of Women and the Law* 397 at 401.
  - 9 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.31].
  - 10 See in particular Chapter Eight.
  - 11 See for example: Louise Ellison and Vanessa E Munro “Better the devil you know? ‘Real rape’ stereotypes and the relevance of a previous relationship in (mock) juror deliberations” (2013) 17 *International Journal of Evidence & Proof* 299; Natalie Taylor *Juror biases and attitudes in sexual assault cases* (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, No 344, 2007); Louise Ellison and Vanessa E Munro “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation” (2009) 18 *Social & Legal Studies* 291; Blake M McKimmie, Barbara M Masser and Renata Bongiorno “What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived” (2014) 29 *Journal of Interpersonal Violence* 2273.
  - 12 “Putting Jurors First: Legislative Simplification of Jury Directions” (2019) 43 *Criminal Law Journal* 180 at 195, citing Sara Gordon “Through the Eyes of Jurors: The Use of Schemas in the Application of ‘Plain-language’ Jury Instructions” (2013) 64 *Hastings Law Journal* 643 and Louise Ellison “Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases” (2005) 9 *International Journal of Evidence & Proof* 239. See also Gerd Bohner and others “Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator” in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan Publishing, Devon, 2009) 17 at 18.

*If a juror has [a] misconception, they will have it from the start of the trial and they will consider the evidence through this “schema” – being a “cognitive framework or concept that helps individuals organize and interpret information”. When jurors have already considered evidence through one lens, it is very difficult for them to reassess that evidence fully and fairly through a different lens: known as the “perseverance effect”. As a result, this topic of cross-examination by defence counsel is likely to be very effective, but not necessarily for the right reasons.*

Fundamental to the process of counsel questioning witnesses and then creating a narrative is asking the fact-finder (in this case, the jury) to draw inferences. While inferences are an inherent part of all trials, in rape trials the use of inference takes on particular importance as there is often a lack of independent, or third-party, evidence about the crucial issues (such as consent, or reasonable belief in consent). The legitimate use of inference is often included in the summing-up with the following example, from *Harete*, being typical of the directions which juries received on this point:

*In all these matters you are entitled to act on logical inferences. Obviously, you will decide what the proved facts are. You are then entitled to go on to draw fair and reasonable conclusions based on the proved facts. You may not speculate or guess but you can draw legitimate inferences from proved facts. This process of inference can be important where state of mind or knowledge is concerned. A person’s proven actions can often give a good indication of what they are thinking or intending at the time those actions are carried out.*

The significance of this direction in rape trials is that the process of drawing fair and reasonable conclusions based on proved facts will necessarily be influenced by each juror’s wider understandings about rape,<sup>13</sup> as well as their assumptions about what is “normal” negotiation or natural expectations about intimacy.<sup>14</sup> If those understandings are based on stereotypical ideas about how a complainant will act, or what conduct amounts to rape, such understandings will influence what the jury believes is a fair and reasonable conclusion. If, for example, the defence theory of the case is that the complainant consented to sex, a juror who believes that they would struggle if they were raped, might interpret the lack of a struggle by the complainant as indicative of consent, even where the complainant described her lack of struggle as being due to fear of the consequences.<sup>15</sup>

13 Nina Burrowes *Responding to the challenge of rape myths in court: A guide for prosecutors* (nbresearch, London, 2013) at 13.

14 See Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (2ed, Routledge, London and New York, 2019); Louise Ellison and Vanessa E Munro “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation” (2009) 18 *Social & Legal Studies* 291.

15 Louise Ellison and Vanessa E Munro “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49 *British Journal of Criminology* 202 at 206 ff.



It is, therefore, not only during the questioning process that care needs to be taken with the reliance on rape myth. There are risks regarding the legitimate use and weight of certain evidence during the deliberation process that also require ongoing attention. This chapter, therefore, begins with an overview of the literature relating to rape mythology, outlining its origins and its contemporary relevance. As our research focus has been on exploring the prevalence of rape mythology throughout the trial process, we now explain the different stages of a trial and discuss where and how we might expect rape myths to be both reinforced and resisted, using examples from the cases in the research.

### **What are “rape myths”?**

The first use of the term “rape myth” is usually attributed to Martha Burt, who defines rape myths as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists”.<sup>16</sup> In Burt’s view, rape attitudes are closely connected with other deeply held and pervasive attitudes, including ideas about sex role stereotyping, distrust of the opposite sex and an acceptance of interpersonal violence. She considers that because belief in rape myths was so closely connected with these other strongly held attitudes, it might be difficult to disrupt people’s adherence to rape mythology.<sup>17</sup>

A more recent, widely accepted definition is that “rape myths are descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women”.<sup>18</sup> Perhaps the classic example is the “real rape” myth, which is the belief that rape *only* occurs between strangers, takes place in public and is violent, or involves threats.<sup>19</sup> This is not to say that rape does not happen in those circumstances, but rather that the “real rape” script or schema is the standard against which all other alleged rapes are measured – when decades of research demonstrates that the majority of rapes do not meet this fact pattern or expectation. In other words, rape myths are erroneous assumptions or stereotypical attitudes about rape or the behaviour and reactions of both victims/survivors and perpetrators that may illegitimately influence the way decision-makers approach cases of sexual assault.

16 Martha R Burt “Cultural Myths and Support for Rape” (1980) 38 *Journal of Personality & Social Psychology* 217 at 217.

17 At 229.

18 Heike Gerger and others “The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English” (2007) 33 *Aggressive Behaviour* 422 at 423, citing Gerd Bohner and others “Rape myths as neutralizing cognitions: Evidence for a causal impact of anti-victim attitudes on men’s self-reported likelihood of raping” (1998) 28 *European Journal of Social Psychology* 257.

19 The concept of “real rape” is usually attributed to Susan Estrich from her article “Rape” (1986) 95 *Yale Law Journal* 1087 and the subsequent book: *Real Rape: How the Legal System Victimises Women Who Say No* (Harvard University Press, Cambridge and London, 1987).

It is trite to say that there can be a wide range of false beliefs about rape. However, the literature does identify some common themes about the types of stereotypes thought to have an impact on the way people think about rape. The following list of commonly occurring rape myths comes from an article by Jennifer Temkin, which was one of the sources used as the basis for developing the categories and coding for this research (see further Chapter Two):<sup>20</sup>

1. *True rape is rape by a stranger. Other rapes are not “real rapes” but more often than not involve misunderstandings or situations where both sides are equally blameworthy or where the complainant has consented and regretted it afterwards.*
2. *True rape mostly takes place in an outdoor location and involves physical violence against a victim who does all she can to resist. She is consequently bruised, particularly in the genital area. At the very least threats of violence are used.*
3. *A woman can always prevent rape by fighting off her assailant. It therefore follows that, save in very rare circumstances, there is no such thing as rape.*
4. *A woman can always withhold consent to sex no matter how drunk she is.*
5. *Only stranger rape is really traumatic.*
6. *Women have only themselves to blame for rape because of their clothes, drinking habits, previous sexual relationships, and risky behaviour.*
7. *Consent to sex can be assumed from mode of dress or certain types of behaviour, such as flirting or kissing.*
8. *True victims have not reported rape more than once. A person who reports rape to the police more than once should be treated with suspicion.*
9. *Genuine victims report rape immediately.*
10. *Genuine victims display great emotion when recounting the events in question.*
11. *Genuine victims will always give a thoroughly consistent account.*
12. *False allegations of rape are very common and constitute a large proportion of rapes reported to the police.*

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20 “And always keep a-hold of nurse, for fear of finding something worse”: Challenging rape myths in the courtroom” (2010) 13 *New Criminal Law Review* 710 at 715–716. We also adapted aspects of the Rape Myth Acceptance Scale – for example: Diana Payne, Kimberly Lonsway and Louise Fitzgerald “Rape myth acceptance: Exploration of its structure and its measurement using the Illinois rape myth acceptance scale” (1999) 33 *Journal of Research in Personality* 27; Sarah McMahon and G Lawrence Farmer “An Updated Measure for Assessing Subtle Rape Myths” (2011) 35 *Social Work Research* 71.

Temkin challenges these myths on a number of bases. She considers that some of the myths are not only false, but also irrelevant to the question of criminal responsibility. In England, as in Aotearoa New Zealand, there is no requirement that physical violence, threats or force be present for the definition of rape to be satisfied, and certainly no requirement that the defendant be a stranger to the complainant.<sup>21</sup> Temkin also considers that many of these rape myths defy common sense. For example, the myth that claims a woman can always fight off her assailant, given the disparities in strength between most men and most women, and the myth that claims a woman can also withhold consent, even if intoxicated to the point of passing out, are clearly founded on irrational beliefs. Research also shows that many of the historically commonly held beliefs about rape are demonstrably false.<sup>22</sup> Victims of both stranger and acquaintance rape may suffer from post-traumatic stress disorder, and many victims have a controlled response when recounting their experience, so appear calm and composed, rather than distraught or emotional. In addition, memory can be affected by trauma so that inconsistency in recall is not necessarily indicative of untruthfulness.<sup>23</sup>

While many, if not all, of these ideas about rape represent false generalisations, the fact remains that in some situations there may be some basis in fact. In other words, as noted above, the issue is not that stranger rape does not occur at all – it does. Some rapes do involve physical violence, and consequential injuries, and some victims immediately report the rape to the police. Rather, the problem is when the idea that rape only occurs by the actions of a stranger becomes the implicit criterion against which all alleged rapes are measured. Myths involve generalisations about *all* rape.<sup>24</sup> If conduct is measured against those generalisations and found to be lacking or different in some way, it does not necessarily inform decision-makers about the particular situation. It certainly does not inform decision-makers that a rape has not occurred in that situation. As discussed below, this becomes particularly important in a trial context, where juries are involved in a process of fact-finding and are presented with different narratives about a particular event.

As some of the beliefs outlined by Temkin are patently untrue, and in light of changing social norms, the ongoing relevance of rape myths as an object of critique or basis of analytical work has been questioned. Helen Reece has argued that while the “real rape” myth can be seen as representing the idea that real rape is the normal way in which rape occurs (for which there is sound evidence showing that this is, in fact, inaccurate) there is no evidence

21 See the definition of rape in section 128(2) of the Crimes Act 1961 – see Appendix Two.

22 For example, the belief that rape complainants are uniquely likely to be lying and that rapists are usually strangers to their victims: see Lisa Dufrainmont “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44 Queen’s Law Journal 316 at 331.

23 Jennifer Temkin “‘And always keep a-hold of nurse, for fear of finding something worse’: Challenging rape myths in the courtroom” (2010) 13 New Criminal Law Review 710 at 716–717.

24 Jennifer Temkin, Jacqueline M Gray and Jastine Barrett “Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study” (2016) 22 Feminist Criminology 1 at 2.

of widespread belief in this myth.<sup>25</sup> Reece argues that, instead, the notion of the regressive nature of current public attitudes about rape is overstated and that “myths about myths” are being created.<sup>26</sup>

Joanne Conaghan and Yvette Russell appropriately, and compellingly, establish that Reece has overlooked the point that “real rape” does not necessarily operate as an appeal to truth, but rather as a heuristic device for interpreting and evaluating information about rape.<sup>27</sup> In other words, whether or not jurors actually believe the real rape myth is largely irrelevant. Rather, its long-lasting pervasiveness means that it will almost certainly influence a juror’s reasoning process. The closer that a complainant’s story matches the stereotype of what a real rape looks like, the easier it is for jurors to accept it (this was acknowledged by Reece).<sup>28</sup>

This point is reinforced by the mock jury research undertaken by Louise Ellison and Vanessa Munro. The researchers undertook a study in which the majority of participants, at least in principle, seemed open to the idea that a woman could be raped by a man she had previously been in a relationship with. In addition, comments from the participants indicated an understanding that most rapes are committed by someone known to the complainant, rather than a stranger, and there was no clear indication that the participants considered rape by an acquaintance to be any less serious than rape by a stranger.<sup>29</sup> However, despite the broad general attitudes expressed by the participants, it was a recurrent theme among the mock jurors *while deliberating* that convicting in an acquaintance rape case was more difficult, partly due to the ambiguity that jurors felt when the complainant and defendant were acquainted, particularly in a previously intimate relationship.<sup>30</sup> In other words, there is a demonstrable difference between jurors (and others) being able to recognise and reject a myth in the abstract, as opposed to identifying the specific point in a narrative when an underlying stereotype is influencing their decision-making.<sup>31</sup>

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25 Helen Reece “Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?” (2013) 33 *Oxford Journal of Legal Studies* 445 at 456–457.

26 At 446.

27 Joanne Conaghan and Yvette Russell “Rape Myths, Law, and Feminist Research: ‘Myths about Myths?’” (2014) 22 *Feminist Legal Studies* 25 at 43–44.

28 At 43.

29 Louise Ellison and Vanessa E Munro “Better the devil you know? ‘Real rape’ stereotypes and the relevance of a previous relationship in (mock) juror deliberations” (2013) 17 *International Journal of Evidence & Proof* 299 at 309.

30 At 310.

31 See Chapter Nine at [390](#).

Conaghan and Russell point out also that Reece's argument overlooks the gendered nature of rape and the long history of legal indifference to rape and other crimes against women.<sup>32</sup> As victims of rape are predominantly women, any failure of the criminal justice system to adequately respond to rape is disproportionately met by women.<sup>33</sup> The gendered nature of sexual assault along with historical distrust of women's claims of being raped combine, as Elaine Craig argues, to "jeopardize the possibility of a fair trial":<sup>34</sup>

*The prosecution of sexual assault reflects a judicial process with a long and deep-seated history of discriminatory beliefs about women, and a reality that in adjudicating allegations of sexual violation (which primarily means credibility assessments), finders of fact are almost always asked to make decisions under conditions of uncertainty. This makes schematic thinking both particularly likely and uniquely problematic in sexual assault trials.*

*When a lawyer suggests to a complainant that the reason she did not tell anyone right away is because she is fabricating the allegation to cover up consensual sex she now regrets, or points to a lack of physical injury as evidence of consent, or intentionally introduces a trial judge to inadmissible evidence demonstrating a complainant's so-called promiscuity, he or she deploys a powerful heuristic that risks triggering reasoning that is both difficult to displace and wrong at law.*

*The persuasiveness and intransigence of these entrenched stories about sexual violence divert reasoning from a process of legal findings based on relevant evidence. In other words, these stereotypes about rape jeopardize the possibility of a fair trial.*

Given the nature of sexual assault trials, which often involve events that have occurred in private and for which there are different accounts of the events in issue, it is unsurprising that jurors may resort to stereotypes in coming to conclusions.<sup>35</sup> While this may not be deliberate, it still has the potential to impact greatly on the jury's reasoning processes. In addition, research suggests that in rape trials there is likely to be a pre-trial prejudice of jurors that can have a significant influence on verdicts.<sup>36</sup> It is for these reasons that we considered

32 Joanne Conaghan and Yvette Russell "Rape Myths, Law, and Feminist Research: 'Myths about Myths'?" (2014) 22 Feminist Legal Studies 25 at 37–38.

33 At 38.

34 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018) at 101 (extra paragraph spacing added for emphasis).

35 At 160–161.

36 Nina Burrowes *Responding to the challenge of rape myths in court: A guide for prosecutors* (nbresearch, London, 2013) at 7 (and the research she cites in support).

further research was required, and that research grounded in an analysis of what actually happens in court is the best way to assess whether, and to what extent, rape myths are still being reinforced during the trial process.

### ***Rape myth reinforcement or resistance during the trial process: when and why?***

It is not only defence counsel who may rely on rape mythology during the trial process. Prosecutors may also structure their case around rape myths, including beliefs that a rape victim will struggle or physically resist and will complain immediately.<sup>37</sup> Judges may also reinforce rape mythology through admissibility decisions (especially regarding sexual history evidence),<sup>38</sup> lack of intervention during defence or prosecution questions,<sup>39</sup> or through the language used in their directions to the jury.<sup>40</sup> This research therefore records, in different chapters of this book, the explicit reliance on and/or reinforcement of rape mythology in all the parts of the trial process that we had access to – including pre-trial and at trial admissibility decisions, complainant questioning and directions to the jury. Of course, as Joanne Conaghan points out, the “influence of the real rape stereotype” (for example) is not dependent on “explicit endorsement” – rather the concern is that “stereotypes too often influence *unconsciously*, to instil implicit biases that inform evaluative judgments”.<sup>41</sup>

### **Admissibility decisions**

In order for evidence to be admissible in any trial, it must be relevant (to an issue in dispute) and of sufficient probative value to outweigh the risk of unfair prejudicial effect on the proceedings.<sup>42</sup> There are two specific admissibility rules in the Evidence Act 2006 that apply only in sexual cases,<sup>43</sup> including trials involving allegations of rape.<sup>44</sup> These rules require that the evidence must be of “such direct relevance that to exclude it would be contrary to the interests of justice”. In other words, the admission of the evidence is subject to a heightened relevance test.

One of the specific admissibility rules, section 44, governs evidence of the sexual experience of the complainant with a person *other than* the defendant. This rule is to avoid impermissible links, as part of a reasoning process, being drawn between the complainant’s

37 Julia Quilter “Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform” (2011) 35 Australian Feminist Law Journal 23 at 31.

38 See Chapter Five.

39 See Chapter Eight.

40 See Chapter Nine.

41 “The Essence of Rape” (2019) 39 Oxford Journal of Legal Studies 151 at 165 (emphasis in original).

42 As provided by sections 7 and 8 of the Evidence Act 2006.

43 As defined in section 4 of the Evidence Act 2006 – see Appendix Two.

44 Sections 44 and 88, discussed in Chapter Five and Chapter Six, respectively.

sexual experience and the likelihood the complainant consented to having sex with the defendant, as well as the likelihood that the complainant is lying about being raped. As such, admissibility arguments are often reliant on an acceptance (or rejection) by the judge as to expected complainant behaviour – especially when it is claimed the evidence has relevance to credibility.

In the cases in this research, the judge’s admissibility decision (not always the trial judge) usually included reference to the purpose and use of such evidence, and the extent to which such use was legitimate, given the policy behind section 44. On occasion, the decision to exclude the evidence included a reference to reliance on “illogical and flawed” reasoning by the party seeking to admit the evidence, which we read as resistance to a contestable (and unsupported) rape myth that a woman would never have (consensual) sex shortly after being raped:<sup>45</sup>

*The [defence argument] seems to rely upon a proposition that no woman who has been raped would then engage in sexual activity a relatively short time afterwards, and that is simply an assertion which the Crown suggest ... is made without evidence ... I am not prepared to grant leave in a situation such as this. In my view the reasoning is illogical and flawed, and at the end of the day there is a real risk of character blackening in a case such as this. ... [I]n my view, it is illogical to suggest that there is a time frame within which a woman can consent to a sexual relationship after having been allegedly raped.*

We discuss the extent to which contestable propositions were relied on when making admissibility decisions in Chapters Five and Six.

### Evidence in chief and re-examination

The evidence in chief of some of the complainants, in both the principal study and the Pilot cases, was provided by the playing of a pre-recorded evidential video interview (EVI). In these cases, the prosecutor would usually ask the complainant some supplementary questions (examination-in-chief),<sup>46</sup> constrained by the witness questioning and admissibility rules in the Evidence Act 2006, ethical obligations and the applicable rules of procedure. In such cases, as we had not sought access to the EVI (or the transcript of the EVI), we only analysed the supplementary questions.<sup>47</sup> When a complainant gave evidence in chief *viva voce* (meaning for this purpose, orally in court, whether behind a screen or via closed-circuit television or video link), we analysed all of this evidence, as well as noting any objections from defence counsel or intervention from the trial judge.

45 Pre-trial decision in *Tait*.

46 See further Chapter Four at 106.

47 Our focus was on analysing questioning by counsel at trial, not that undertaken by specialist interviewers pre-trial.

These two parts of the questioning process (evidence in chief and re-examination) were coded with reference to occasions where prosecution counsel was seeking to rely on a rape myth (such as the fact of an immediate complaint), as well as occasions where counsel was seeking to forestall any reliance on a rape myth. An example of the latter scenario is when the prosecutor asked the complainant a question like “why did you not go to the police until a week later?”, which gave a complainant an opportunity to offer an explanation. The possibility for such an explanation might also have been offered during re-examination (which may follow the cross-examination of the complainant).<sup>48</sup>

In some cases, the prosecutor used the re-examination process to try to allow the complainant to explain why she had behaved in a particular way, in an attempt to move the focus from the general to the specific. In *Devi*, it was put to the complainant during cross-examination that getting into a car with the defendant and going to his home was inconsistent with the behaviour of a rape victim. This is an extract from the re-examination:<sup>49</sup>

*Q: And, lastly, my learned friend suggested to you that you wouldn't have got into the car if you had really been raped by the accused and I just want to give you the opportunity to explain to us in your own words, first, how you felt when you saw the accused on [street name] that day?*

*A: I was petrified.*

*Q: Did you have any of your friends or your family around you?*

*A: No.*

*Q: You told us you were close to home. How did you being close to home make you feel in relation to him?*

*A: More, more, more nervous and more scared.*

*Q: And what were you scared and nervous about at that point?*

*A: I was scared that he might find out where I live.*

*Q: So, again were you able to think straight at that point?*

*A: No.*

*Q: And you've told us that you went to his house, did you do that willingly? Did you want to go?*

*A: No.*

*Q: Was it you that wanted to talk about things with him?*

*A: No.*

48 See section 107 of the Criminal Procedure Act 2011 (“Conduct of jury trial”).

49 See further Chapter Six at [212](#).



Q: *Did you want to have anything to do with him?*

A: *No.*

Q: *And when you got out of there, why did you run home? Why were you running?*

A: *I just had to get to my safety zone.*

Our analysis of the examination-in-chief and re-examination of complainants, therefore, demonstrates how often the prosecutor assisted the resistance of rape myths by allowing the complainant to give reasons as to why she did not behave in a particular (expected) way.

We also coded any instances where the prosecution sought to rely on rape myths, or reinforce aspects of the complainant's behaviour claimed to be consistent with the way real victims behave. This occurred particularly in meaning-making about the complainant's distress and the time and way in which she complained:<sup>50</sup>

Q. *And so why did you run to your cousin's house?*

A: *Because he was the closest out of everybody else.*

Q: *But what did you want?*

A: *I wanted him to, um, ring the police for me.*

Q: *So, when you got to his house, was anyone home?*

A: *Yes, he was home, his wife was home and the two kids.*

Q: *All right. Now, by the time you reached their house down [street name], how would you describe your own state?*

A: *I was very – I was crying. I just actually walked straight up to the door and knocked on the door and she answered it.*

Q: *Okay.*

A: *She's never seen me like this before.*

This research also provides other examples of the prosecution seeking to rely on rape myths when of assistance to the Crown case, by using aspects of the evidence offered at the trial through questioning of the complainant to support a closing argument based on the construction of the alleged rape as having the hallmarks of a real rape. Such closings focus on, for example, the significance of a distressed early or immediate complaint, evidence of the complainant struggling or calling out during the alleged rape, consistency of accounts over time and ceasing all contact with the defendant. The following example is an extract from the Crown closing in *Gamage*:

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50 *Ahmed*, examination-in-chief. See also Chapter Nine at 405.

*This is not a “he said, she said” case. We have evidence in this case which either supports her or is consistent with her evidence and I’ll mention this in a bit more detail later on but briefly it is the immediate complaint to her cousin, Ms G. Straight away, after she has left the shop, tells her Mr Gamage’s put pornography on, he’s locked the door, he’s held her down, he’s grabbed her hands and forced her to have sex.*

*What about her demeanour? How she looked to her cousin? Looked upset, really upset, had her head down, looked like she’d been crying. Her eyes were wet. She wasn’t there. She wasn’t herself. She was withdrawn.*

While prosecution reliance on rape mythology was not an initial focus of research aimed at determining the reasons why the questioning in rape trials has been so resistant to reform, we believe it is important for a wider and well-informed public debate to document and explore the legitimacy of *all* uses of rape mythology during the trial process. Prosecutorial reliance on rape mythology also reproduces and perpetuates the underlying heuristic schema, in the absence of any corrective or contextualising material (or even with it).<sup>51</sup> We are of the view, in keeping with research that seeks to document current trial process in order to consider the desirability of any further reform to trial process, that selective reporting of reliance on rape mythology is not appropriate.

### Cross-examination

Following the complainant’s evidence in chief, defence counsel cross-examines the complainant. It is well known that cross-examination is reported by complainants as the most difficult and distressing aspect of trial process.<sup>52</sup> However, cross-examination is also necessary to test the evidence and expose unreliability.<sup>53</sup> Rules of evidence, procedure, ethical obligations and trial conventions also govern the scope of cross-examination.<sup>54</sup> Questions that might rely on or indicate rape myth were identified in this part of the trial process. Such questions included counsel asking the complainant if the defendant had been violent, or threatened the complainant, asking her why she did not disclose the alleged offending to a particular person or at a particular time, or what did she think would happen if she invited him into her bedroom.

51 We are grateful for the observations of Yvette Russell and Nicola Gavey on this point. See also Julia Quilter “Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform” (2011) 35 Australian Feminist Law Journal 23 at 31: “The adversarial context in which rape trials are run means that both the prosecution and defence argue reverse sides of the same coin; what they both accept is the schema itself. This means that the ‘schema’ is left intact, in turn consolidating these visions of rape as ‘correct’ and to the exclusion of other narratives or visions.”

52 See Chapter One at 3.

53 Pamela Radcliffe and others *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (Oxford University Press, Oxford, 2016) at [8.33].

54 See further Chapters Five, Six, Seven and Eight.

In analysing the annotated trial transcripts (the Notes of Evidence or NOE), the focus, therefore, was on questions asked by defence counsel that might indicate that a particular myth was being inferred or relied upon, such as: “And there’s no suggestion from you that he was talking to you in a threatening manner?”<sup>55</sup> This example was coded as “resistance – absence injury, force or threat”. However, we were also interested in the way in which rape myths were challenged or resisted in these trials. Therefore, in the same way that prosecution questions that sought to undermine rape myth meaning-making were coded as resistance, passages in cross-examination where the complainant offered other information or an alternative explanation where a rape myth might otherwise be implied were similarly coded.

The following example is from the cross-examination of the complainant in *Waititi* in which her behaviour (lack of making a hue and cry at the time) is questioned, and she provides an explanation:

- Q:** *Do you agree that if you were not happy or consenting in terms of what was going on with Mr Waititi, it would have been very easy to end what was going on by simply shouting out?*
- A:** *Yes, that always seems like the obvious easy thing that would happen, but I don’t think that happens in every case. I think people’s reactions to situations is often completely different to what they think it would be.*

While this coding process provided insights into how often and when a particular myth is reinforced or resisted in the trial process, the writing up of this research into book form, with divisions into chapters, required a focus on particular myths in separate parts of the whole.<sup>56</sup> Therefore, for example, this particular “myth” (women can and will struggle and call for help when being raped) is primarily discussed in the context of the aspect of the case it has relevance to – consent and belief in consent.<sup>57</sup>

Other rape myths about the expected behaviour of real victims of rape, it is either argued or uncontested (through the lack of objection or comment), have relevance to the assessment of the complainant’s credibility. If a real victim of rape would complain immediately, then a complainant who has delayed reporting is less likely, or unlikely, to be telling the truth about what happened. This type of inference was the basis for a line of cross-examination in cases in both the principal research and the pilot study.

In *Vandenberg*, defence counsel asked the complainant at six different points during the cross-examination whether she had disclosed the alleged offending immediately after it occurred:

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<sup>55</sup> *Waititi* cross-examination.

<sup>56</sup> See further Chapter One at 12.

<sup>57</sup> See Chapter Seven at 277. See also Anastasia Powell and others “Meanings of ‘Sex’ and ‘Consent’: The Persistence of Rape Myths in Victorian Rape Law” (2013) 22 Griffith Law Review 456.

Q: *So, you had a conversation about your bag with this guy, but you didn't mention any sexual assault at all with him, did you?*

A: *Not at the time, no.*

Q: *Even though he was a security guy employed by the bar where you'd been?*

A: *He also appeared to be a friend of the guy.*

Q: *Why would you say that?*

A: *They seemed to know each other.*

...

Q: *Then your friend Madeleine who's your step-cousin who you've known, since nine years old, you met her. You told her that your bag was lost, didn't you?*

A: *I told her that my bag is lost, he's taken it, yes.*

Q: *Again, I'll suggest that you never used the word "stolen" or never suggested that he'd taken it, at that time with Madeleine?*

A: *I wouldn't agree with that.*

Q: *You didn't mention anything about being sexually assaulted to Madeleine at that time, did you?*

A: *No, I did not.*

...

Q: *So, when you say that it hadn't registered with you, what you're saying isn't it is that you hadn't called it – you weren't calling it a sexual assault, a rape.*

A: *I wouldn't agree with that, no. I was aware of what had happened but I didn't want to know, and my coping mechanism was just to find my bag and go home but I couldn't go home without my bag.*

Q: *So, there's no complaint to anyone that night about any sexual assault or rape is there?*

A: *No.*

...

Q: *You got back in the club and you talked to a woman behind the bar?*

A: *That's correct.*

Q: *She was quite helpful to you, wasn't she?*

A: *She was, she was trying to calm me down.*

Q: *But you didn't make any complaint to her either, did you?*

A: *Not at that time, no.*

...

Q: *And then you bumped into someone else you knew as well?*

A: *Yes.*

Q: *No complaint to him either?*

A: *No.*

Q: *And, again the enquiries are all about your bag, that you've lost your bag?*

A: *Yes.*

...

Q: *Your first contact with the police was through the 111 service wasn't it?*

A: *Yes.*

Q: *And would you accept that you phoned the police, the 111 service shortly, about a quarter past nine in the morning?*

A: *Yes.*

Q: *Sound about right?*

A: *Yes.*

Q: *Will you accept that when you spoke to the police operator the first thing you told her was that you were phoning to report that your bag had been stolen from [bar]?*

A: *That's correct and when she asked me how my bag had been taken that's when the shock of the events of the night before hit me and I realised exactly what had happened and she transferred me through to someone else.*

Q: *So when you were explaining to her how your bag came to be stolen you said that you left it in an unknown male's car (pause) and then you went onto say that he raped you, so the original complaint to the police was about your bag wasn't it?*

A: *That's correct.*

Each time the defence counsel asks whether a complainant has made a complaint to a particular person, this reinforces a perceived difference in the way the complainant has behaved with the way that a real victim would. Reliance on rape myth occurs in cross-examination either to suggest the complainant, by her behaviour both before, during and after the alleged rape, had consented to sex with the defendant, or to challenge the credibility of the complainant and suggest her version of events is untrue.

Aside from analysing when and how rape myths were relied on during cross-examination, we also coded for judicial intervention and objections from the prosecution. We were interested to see how often questions based on contestable rape myths (seeking to elicit what we claim would be irrelevant information) were challenged by either the judge or the prosecution. The discussion of this analysis is in Chapter Eight.

### Closing arguments: prosecution and defence

While the process of questioning and elucidating the evidence is obviously important, we were also interested to see how counsel used the evidence that had emerged during the trial to build a narrative for the jury in their closing statements. The closing statements are where first the prosecution, then the defence, present their cases to the jury, comment on the evidence or issues and point out what they consider to be inconsistencies or problems with the opposing case. Reliance on rape myth in closing arguments may well operate to reinforce and validate the jurors' beliefs about "real rape" and true victim behaviour, and may be incorporated into the closing specifically for this purpose – to encourage a particular line of inferences. Part of this research, therefore, documented the extent to which rape mythology is used in this way.

We analysed the narratives that the prosecution and defence counsel created for the jury, the ways they tried to align or differentiate the circumstances of the current case with the various underlying myths, and to what extent there was overt reliance on gendered stereotypes. It was an important, and relatively unique, aspect of this research to document the extent to which the jury was invited to use, or rely on, rape myths during their deliberation process. Therefore, we used the same coding scheme to code rape myths in the closing statements to the jury. An aspect of this analysis was the ways in which Crown counsel challenged or sought to disrupt rape myths during their closing – for example in *Gamage*:

*It's important at the outset though that you understand that sexual violation by unlawful sexual connection and sexual violation by rape, do not of themselves mean that it's sexual conduct or sexual connection accompanied by violence. That's not what our law is about. When we talk about rape we often think about, you know, people being dragged off into the bushes, and force and pressure and screaming and yelling. Well, I can tell you that that's not the law. The law is that rape or sexual violation is sexual conduct without consent and without a belief in consent based on reasonable grounds. And it's important that you understand that from the outset.*

The coding for rape myth in the defence closing arguments included not only a focus on historical contestable claims (such as rape being an allegation that is easy to make),<sup>58</sup> but also on more contemporary tropes that are part of the narrative of normal heterosexual intimacy, or in Nicola Gavey's words, form part of "the cultural scaffolding of rape".<sup>59</sup> One argument that emerged relatively regularly in the closings was that what occurred was the result of normal, unremarkable,<sup>60</sup> masculine sexual urgency.<sup>61</sup>

58 See Chapter Nine at 418.

59 Nicola Gavey *Just sex? The cultural scaffolding of rape* (2ed, Routledge, London and New York, 2019).

60 At 228.

61 This is an extract from the defence closing in *Harete*. See further Chapter Nine at 452.

*Well you might remember Boris Becker who won Wimbledon a few times, tall, red-headed German tennis ace, his marriage broke up because he had sex in a cupboard in a restaurant and a baby evolved from it. You might remember a mayor of one of our cities who acted in a way not becoming of a mayor. You might remember a president of a European country at present acting inappropriately. The simple matter is that when it comes to the sex drive, opportunity meeting urge, it can happen in many, many ways. But what we do know here is the opportunity presenting itself to Mr Harete this evening and the urge that he satisfied with that opportunity was unequivocally from his perspective with the co-operation and encouragement of the complainant Hazel McKay.*

How rape myths were used in closing arguments, and the extent to which they were resisted or problematised by the judge as part of the summing-up to the jury, is discussed in Chapter Nine.

### Summing-up for the jury and questioning of the complainant by the trial judge

The final aspect of our analysis was, by using the same coding scheme, to assess the extent to which the trial judge countered narratives that were heavily reliant on rape myths, or warned the jury about the use that could be made of such submissions. The judge has a duty to direct the jury about the law and the use that can be made of the evidence. The judge must also summarise the prosecution and defence cases for the jury.

We also recorded how often judges used existing statutory warnings, such as that contained in section 127 of the Evidence Act 2006, to disrupt reliance on rape myths,<sup>62</sup> and whether any other counter-intuitive directions concerning memory or complainant behaviour were given.<sup>63</sup> A related inquiry was the extent to which judges referred to the applicable aspects of section 128A of the Crimes Act 1961, which contains a form of legislative guidance on resisting rape mythology – for example, that “[a] person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity”.<sup>64</sup>

As part of the coding process to identify and record judicial intervention, we were able to analyse the content of any questions asked by the judge of the complainant. While the relatively small numbers of questions meant they were not also coded for rape myths, we do comment in the relevant chapters where, in our view, those questions reinforced or resisted rape myths or the “real rape” schema.

62 See Chapter Six at [219](#) and Chapter Nine at [405](#).

63 See Chapter Six at [240](#) and Chapter Nine at [469](#).

64 Section 128A(1) of the Crimes Act 1961 – see Appendix Two. See further Chapter Seven at [277](#).

### *Conclusion and further analysis of the cases*

Documenting the reinforcement of rape mythology during aspects of the trial process was the starting point for analysing the extent to which such use impacts on complainant experience of the questioning process. This research also uncovers how judges and prosecutors contribute to the ongoing reproduction and reliance on the “real rape” schema, and rape mythology. We suggest at various places how this schema could be disrupted and the myths resisted within the trial process as it currently exists. However, the extent to which this is achievable or will result in real change to the prosecution of adult rape may be questioned – given the inability of the law, and the criminal justice system in particular, to recognise and respond to women’s experience.<sup>65</sup>

Our contribution to the ongoing conversations on how to respond effectively to and prevent sexual violence against women is limited to documenting and commenting on what the trial process currently looks like, including with regard to adult rape cases in the Sexual Violence Court Pilot. Our analysis, in part, includes noticing where there is reliance on rape mythology. We also, however, consider the operation of evidential, procedural and substantive reforms aimed at achieving fair trial process in rape cases – including the extent to which these reforms may be failing to deliver due to the pervasiveness and perniciousness of rape mythology.<sup>66</sup> In Chapter Four, our analysis of the efficacy of the supports that may be provided to complainants is based on the wider focus on reducing the trauma associated with the trial process, of which reinforcement of rape mythology, we consider, is a part but not the whole. A complainant’s experience in a rape trial can also be improved, we believe, by those in the courtroom noticing her, responding to her and recognising her as a person in an unfamiliar environment with a difficult story to tell.

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65 See for example Yvette Russell “Woman’s Voice/Law’s Logos: The Rape Trial and the Limits of Liberal Reform” (2016) 42 Australian Feminist Law Journal 273.

66 See Chapters Five and Six.



## CHAPTER FOUR

## COMPLAINANT CARE AND SUPPORT BEFORE AND DURING THE TRIAL

*Overview of observations*

During the last 30 years, a number of reforms to law and practice were made in order to decrease the stress felt by adult rape complainants when giving evidence. These changes included access to alternative ways of giving evidence, provision of support people,<sup>1</sup> and courtroom education and orientation visits. When these types of accommodations are provided, research suggests they do help ameliorate the ordeal of giving evidence.<sup>2</sup>

One aspect of this research allowed us to consider what else could be done to assist adult rape complainants to give evidence. Access to the audio recordings in these studies offered a unique opportunity to observe how complainants are treated while they are in the courtroom and the types of difficulties that arise for them while giving evidence. The first part of this chapter begins by presenting our analysis and observations about the nature and extent of care for complainants by the judge and counsel. This analysis demonstrates that there are numerous ways in which to improve complainant experience of giving evidence. A comparison of the judicial communication and care practices between the cases in the principal research and those in the Pilot supports the conclusion that specialised judicial training and procedures have resulted in a difference as to how complainants are treated in the courtroom.

The second section of this part of the chapter focusses on some aspects of courtroom questioning that repeatedly caused difficulties for complainants, such as the lack of familiarity by judges, counsel and, we suspect, the jury with the operation and norms of social media. We then explore patterns of distress caused by aspects of questioning during evidence in chief, in particular the process of describing genitalia and sexual acts and viewing and responding to exhibits. We also comment on a range of problems arising from language use, especially as relates to cross-cultural communication and complex or outmoded

- 1 See section 79 of the Evidence Act 2006. The presence of a support person for the complainants in this research is discussed in Chapter Two at 34.
- 2 See for example Becky Hamlyn and others *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research, Development and Statistics Directorate, London, 2004); Mandy Burton, Roger Evans and Andrew Sanders *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office Online Report 10/06, 2006).

vocabulary. At times, these problems caused unnecessary upset and embarrassment to complainants, caused disruption and delay to trial progress and, in some instances, appeared to contribute to unclear and incomplete evidence. However, we consider there are a range of witness preparation and prosecutorial practices that could be implemented to address or reduce the occurrence of these issues.

The next part of the chapter presents findings from the two studies on the use of alternative ways of giving evidence by complainants. Overall, the use of alternative ways of giving evidence was higher in the pilot study. However, playing the evidential video interviews (EVIs) as a part of the complainants' evidence in chief was lower than expected in both studies. Following our analysis of some of the apparent advantages and challenges of the use of the EVI during the complainants' evidence in chief, we suggest that while there are some inherent tensions in the EVI as an evidential product, innovations in trial procedure in the Pilot may be helping to ameliorate these. The section then examines the terms in which judges directed the jury about the use of an alternative mode of evidence by the complainants, and when.

In the last section of this part of the chapter we examine how some of the practicalities of the courtroom environment impacted on complainant experience. These include the time of day at which complainants began their evidence, how judges managed people and movement when the complainants were in the courtroom, and the range of issues associated with courtroom technology and delay in trial commencement.

Throughout the chapter, and in concluding, we make some recommendations about the management of the courtroom environment, in order to ensure that all adult complainants in rape cases are provided with appropriate and consistent care and support during their time giving evidence.

### ***Caring communication with complainants: toward compassionate and consistent practice***

The clearing of the courtroom during the complainant's evidence in a sexual case protects her privacy and dignity as she gives detailed evidence about sexual acts.<sup>3</sup> It is now a well-settled practice in Aotearoa New Zealand and appreciated by many complainants.<sup>4</sup> However, it also means that what happens while complainants are in the courtroom is not subject to public scrutiny and, so, little is known about the specificities of the attitudes, communication

3 Section 199 of the Criminal Procedure Act 2011 (other people allowed to be present include any person requested by the complainant and any person expressly permitted by the judge). For discussion of the purpose of this practice (first introduced in 1986), see Warren Young *Rape Study Volume 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983) at 26–29.

4 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 73.

styles and behaviour toward complainants while they are giving evidence. Access to the audio recordings made it possible for us to record and analyse all of the communications in the courtroom between the complainant and the judge, prosecution or defence counsel that were not questions asked to elicit or clarify evidence. Talk that is not evidence is not usually included on trial transcripts, and judges and trial counsel do not often observe the discourse of trials, other than those they participate in.

### Communication and interaction with the judge in the principal study cases

*Judges are an important part of the process though because they're gonna make the witness feel more comfortable, or less comfortable in the process depending on how sincere they are, how considerate they are. Yeah clients are really very sensitive to judges.*<sup>5</sup>

Complainants appreciate judges who are courteous and attentive to them and report that this helps them to feel protected and respected.<sup>6</sup> Being treated respectfully by judges can be a positive aspect of the trial process for complainants, even when the rest of the trial is a highly negative experience.<sup>7</sup> Through their demeanour, communication, trial management and practices of pastoral care, judges can make the trial a more humane, less intimidating and less traumatic experience for complainants.<sup>8</sup> A compassionate style of communication and basic gestures of consideration can make the process of giving evidence more bearable for complainants. Equally, judges' behaviour and communication can be distant, dismissive or imperious. This can contribute to a complainant's sense of vulnerability, ill-treatment or unfairness from the trial process.<sup>9</sup>

The predominant style of judicial interaction with the complainant in the trials in the principal research was of relatively low levels of interaction and largely instructive communication. In these 30 cases, the amount and manner of communication from the judge to the complainant fell along a spectrum in which three broad groups were observable. At one end of the spectrum were cases demonstrating minimal communication and assistance. In the

5 Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 84.

6 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 82; Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 83.

7 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 82; Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 83.

8 For discussion in the Canadian context, see Chapter Six of Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018).

9 At 138–139.

middle band were cases featuring more judicial interaction with the complainant, but this was mostly for the purposes of communicating information or giving instructions. At the other end of the spectrum were judges who were active in their engagement with the complainant and more apparently attentive to her needs and well-being.

In approximately a quarter of the principal study trials, judicial communication with the complainant was minimal and often occurred in the third person. For instance, some of these judges would address the jury about the taking of an adjournment and then indicate the same to the complainant by adding that: “I allow the witness to stand down”. Communication was mostly limited to giving brief instructions on required processes, which might include requests to speak up for the audio recording, overnight warnings or standing down the witness. By way of example, a complainant might be instructed “You are on your former oath” when returning from a lunch or overnight adjournment, or at the completion of re-examination when the judge has the opportunity to ask additional questions and then excuse the complainant, she might be told: “I have none. You may go”. In this group of cases, there were few apparent opportunities for complainants to ask for assistance, and episodes of heightened emotionality were rarely responded to proactively by the judge.

In the largest group of cases within the spectrum, comprising a little under half of the trials, judges spoke more frequently and extensively to the complainant as part of managing trial conduct, including instructions about what to do and when, such as reading from interview transcripts or making arrangements during adjournments. These judges made some effort to explain what was happening and to do so in a kind tone, or may have let the complainant know she could ask for a break if she wanted one. However, their communication with the complainant was mostly limited to giving instructions and information. The entire spoken communication from the judge to the complainant in the case of *Young* is provided by way of example:<sup>10</sup>

At the commencement of the afternoon adjournment:

**JUDGE:** *Ms Blackman we are going to take the afternoon adjournment now so you are going to be leaving the courtroom shortly but you are required to come back for more evidence later.*

**A:** *Okay.*

10 In this chapter, the annotations from the audio recording – including complainant expression, judicial and counsel communication and in chambers (in the absence of the jury) discussion – have been included with quoted excerpts where they are relevant to the analysis. Some quoted excerpts have also been lightly edited for readability.

JUDGE: *It's important you don't discuss your evidence with anyone during the afternoon adjournment. Do you understand?*

A: *Yes.*

JUDGE: *Alright thank you. If you can just leave now please with your support person. Thank you.*

After the afternoon adjournment:

JUDGE: *Ms Blackman I just remind you that you are still giving evidence under the oath you took earlier to tell the truth. And the other thing is don't feel rushed and if you need a break at any stage just tell me, alright?*

At the evening adjournment:

JUDGE: *Ms Blackman you are still giving evidence so you are not to discuss your evidence with anyone overnight and you need to come back here to carry on giving evidence tomorrow morning. Alright?*

At the commencement of the second day of trial:

JUDGE: *Good morning Ms Blackman. We will now carry on with the questions being asked of you by defence counsel. Thank you.*

At the end of questioning:

JUDGE: *Thank you Ms Blackman. I have no questions for you and you may –*

DEFENCE: *Your Honour just before the witness is excused may I see your Honour in chambers?*

JUDGE: *Ms Blackman you are not excused yet and if you could just retire please and don't discuss your evidence with anyone while you are out.*

On return from court in the absence of the jury:

JUDGE: *Ms Blackman I have no questions for you. You have now completed your evidence and you may stand down.*

The judge in this case used the complainant's name in most interactions, indicated a break could be requested and provided some contextual information with the instructions that were required. A polite and professional tone was used and the regularity of warnings operated to signal transitions. However, the judge did not speak to the complainant when she was first commenced her evidence nor thank her at the end of testimony, and the communication was mostly comprised of directions.

In the remaining quarter of the principal study trials, judges communicated more expansively and compassionately with complainants. They engaged in communication practices to increase the complainants' comfort, humanise the courtroom experience, provide information about what would happen in advance, and give reassurance to distressed or emotionally impacted complainants. These kinds of practices were present in the middle group, but in this smaller group, they occurred more often and in greater combination. The overall effect created was that communication with the complainant in this group of cases was more clearly focussed on complainant well-being.

### **Demonstrating care in communication with complainants: analysis of best practice**

Analysis of the style and content of communication in the latter group of cases identified two primary aspects of the empathetic attitude these judges demonstrated. Firstly, greeting the complainant and guiding her through the trial process, and secondly, proactively attending to the complainant's needs as they arose. Greeting and guiding practices included welcoming the complainant, orienting her to the courtroom and assisting her to settle in, signalling transitions in the process, and thanking the complainant for coming to court. Attending to complainants who became distressed during questioning included offering or accommodating requests for unscheduled breaks or explaining the reasons for certain types or lines of questioning. Judges also needed to manage various trial procedures or courtroom problems as they arose and did so in reassuring and supportive ways. In order to open the courtroom door to critique and provide feedback on the treatment of complainants by judges and support the development of good practice, some examples of these practices are provided and discussed.

A welcome and some explanatory orientation from the judge when the complainant first enters the courtroom may help to humanise the courtroom and ground complainants in, what might be, a foreign environment. In Aotearoa New Zealand, complainants in sexual violence cases should be provided with the opportunity of a pre-trial courtroom orientation visit.<sup>11</sup> However, even where such visits are undertaken, they are usually carried out in an empty courtroom and the experience is an abstract one. Entering the courtroom while it is in session and seeing the jury and defence counsel for the first time may, therefore, be confronting. A welcome could reassure the complainant as to the judge's role in managing the courtroom and help to settle anxiety and fear. This may, in turn, contribute to clearer and better evidence from the complainant.

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11 Crown Law *Victims of Crime – Guidance for Prosecutors* (6 December 2014) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [14]; Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.15]. The prosecution may provide courtroom education themselves, along with the officer in charge, or arrange for it to be provided by a Victim Advisor. Information and video resources that explain the courtroom layout, the role of those present and the process of giving evidence for complainants are available online <https://sexualviolence.victiminfo.govt.nz/en/home/the-court-process/the-trial-itself/>.

A greeting was offered to the complainant in only seven of the 30 (23%) principal study trials. Elements of the various welcomes included: addressing the complainant by name; the judges introducing themselves; explanations of the oath process; descriptions of the order of proceedings; informing the complainant that she may ask for a break; and introducing the commencement of evidence in chief. No single welcome contained all of these elements, but the following are examples from the principal study cases of *Simon* and *Wilde*.

**JUDGE:** *Just before we start. Good morning Ms Azarmandi. I'm the judge. I'll be presiding over the trial. Just to let you know we will be playing the DVD interview that you made [on date] first. So, when we play that you will be able to go and have a seat just down there so that you can see the screen. And we stop for lunch at one o'clock so we probably won't have finished that tape by the time we stop for lunch, but we will finish it off afterwards. Alright?*

...

**JUDGE:** *Ms McCann you are going to be giving evidence. If at any stage you have a concern or you need to stop for any reason just let me know at any stage. Do you understand?*

**A:** *Alright. Yes.*

**JUDGE:** *Alright thank you. We are just going to bring the jury in now and then the prosecutor will ask you some questions. Alright?*

**A:** *Ok. Thank you.*

Other aspects of greetings included ensuring that the complainant could see and hear proceedings properly, understood the purpose of the microphone (and could be heard by the transcribers), and checking that she had access to water and that her support person was seated nearby if she had one.

In nine other cases in the principal study no such greeting was offered, however the judge did speak to the complainant before she commenced giving evidence, usually in order to adjust or explain the presence of the microphone. Thus, in 14 cases (47%), the judge did not speak to the complainant before she began answering questions. Even if a complainant had been told during pre-trial preparation that she was welcome to speak to the judge if she needed something, it is difficult to imagine that she would perceive this to be a genuine invitation in this context.

Only five judges in the principal study provided some guiding or orienting information throughout the evidence giving process. For instance, in the case of *Gamage*, the judge spoke directly to the complainant at points of transition – before and after breaks or adjournments, and at each change in proceedings – using a kind tone, addressing her by name and explaining proceedings as they occurred. This extract provides an example:

End of day one:

*JUDGE: Ms Taylor, my apologies for starting late today, ah, it was just matters outside our control. As well though, I am going to have to ask you to come back again in the morning. So, can you and [support person] be back here at 10 am in the morning and then we will have the rest of your evidence then? So, if you would like to leave now?*

*A: Thank you.*

Court resumes the next morning:

*JUDGE: Good morning Ms Taylor. Now we will have to re-swear you this morning but once we have the jury in, alright?*

Morning adjournment:

*JUDGE: Ms Taylor if you wish to have a break, [name] who is our court attendant will take you for your break. You just have to have someone with you during that time, alright? Just have [name] with you, stretch your legs, I don't know if you smoke-*

*A: Check on my [child]?*

*JUDGE: Yes, you can go and check on your [child], that would be fine.*

Some of these judges also told the complainant about changes in questioning processes, for example: “[name] for the defendant will ask you some questions now”, and some also explained adjournments to the complainant and personalised or contextualised warnings.

In 21 of the 30 principal study trials, the judge thanked the complainant at the conclusion of her evidence and as she was being excused. Thanking a complainant for coming to court to give her evidence is a courteous practice that can go some way to acknowledging the effort and stress involved in doing so.<sup>12</sup> Complainants in sexual offending trials have expressed a desire for increased acknowledgment of their contribution to the trial and the impact that coming to court and giving evidence had on them.<sup>13</sup> Judges are high status representatives of society so their appreciation can acknowledge the civic service that complainants perform when reporting an alleged crime and providing evidence in court.

<sup>12</sup> The Council of the Inns of Court *Raising the Bar* (2019) <https://www.icca.ac.uk/raising-the-bar> at 42.

<sup>13</sup> Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018).



While the practice of thanking complainants was relatively widely used in the principal study, there was a range of ways of doing so, for example:

*JUDGE: Alright. Thank you. You are now free to go.*

...

*JUDGE: I've got no questions. Thank you for coming and giving evidence. You may step out of the box and leave court when you are ready.*

...

*JUDGE: Ms Smits, you will be relieved to know that I don't have any questions and so thank you very much for your evidence; you're excused and can go now.*

We prefer the approach taken in the latter two examples (rather than the reference to them being “free to go”), and the particular practice of thanking the complainant by name, as more personal and acknowledging. As noted in *Raising the Bar*, judges can maintain their position of impartiality while thanking the complainant, by acknowledging the effort associated with giving evidence as a witness, rather than being seen as affirming or approving of the content of the evidence itself.<sup>14</sup>

The practice of thanking a complainant for coming to court and giving evidence may also be clearer for complainants. Several women appeared not to understand what it meant to be “excused”. Some complainants, not being familiar with the steps in the questioning process, appeared to have difficulty differentiating between adjournments and the end of their evidence; for instance:

*JUDGE: Yes Ms Cowan. You are now excused. So, you can leave the Court.*

*A: So, does that mean I leave for the day?*

*JUDGE: Yes, you can step down and you are free to leave for the day. Thank you.*

Therefore, in the principal study, although thanking the complainants for coming to court was relatively common (70% of the cases), practices such as welcoming the complainants were less common (23%) and orientating and guiding the complainants on courtroom procedure even less so (17%).

### Judicial communication and interaction in the pilot study cases

In the pilot study of 10 cases, judicial communication with the complainants was noticeably increased in frequency and generally warmer in tone. This was a clear area of difference between the principal and pilot studies. Most of the pilot study judges communicated with

14 The Council of the Inns of Court *Raising the Bar* (2019) [www.icca.ac.uk/raising-the-bar](http://www.icca.ac.uk/raising-the-bar) at 42.

the complainant, and demonstrated care and concern for her well-being throughout her evidence. Not all judges spoke to the complainant at length, but even in these cases, the tone of communication was generally kindly and reassuring. Judicial interaction with complainants tended to occur in ways that complainants have said helps them to feel like the trial process is less unfair or re-traumatising.<sup>15</sup>

Greeting and guiding practices were both more common and more substantial in the pilot study cases. In six of the 10 cases (60%) the judge greeted the complainant before she began giving evidence and in each of these cases also provided some orientating information or engagement. The following excerpt from the Pilot case of *Waititi* demonstrates a welcome that combined many of the elements of greeting and guiding discussed above:

**JUDGE:** *Good afternoon, Ms Fan, come on in, take your seat. There's no one in here you need to be concerned about for the moment, alright. Alright, so I don't know if you've been shown this courtroom before? Have you been in and had a look at it before? Ok, so someone's explained it to you, the set up and how it all works with that screen? Ok. In a moment, the defendant will come in, he's not in the courtroom at the moment, and he comes in at a door nearby, he'll be seated out, out of your view. After that happens, we will get the jury to come in, and they'll just take their seats and then we'll begin. So, the first thing that will happen is that you will be, you'll be sworn in. You'll need to stand to do that. Just stand up for me for a moment in the, in the box? Yeah, that should be fine, just wanted to make sure that the screen is lined up. So, we will make you stand to get sworn in. And then the first questions will be from [the prosecutor]. We take lunch break at one o'clock. Whether we take it at exactly one will depend on where [the prosecutor] is at and where you're at and what stage we're at in your evidence. It will be somewhere around one, we'll start again at 2.15. When the time comes to end for lunch, we'll do the same thing that we've done now, except in reverse. The jury will walk out, the defendant will leave, you'll be free to walk out of the courtroom without worrying about where you're putting your feet, and whether you might be seen, or anything like that.*

Witness supportive procedures adopted in the Sexual Violence Court Pilot also focus on, or enable, improved communication between judges and complainants. For instance, in *Waititi*, above, there is an opportunity for such a full greeting because the complainant enters the courtroom before the jury; a procedure that appeared to be more common in the pilot study

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15 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018); Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DCLinPsy thesis, University of Auckland, 2017).

cases. It is also increasingly common in the Pilot for the judges to meet with the complainants outside the courtroom (usually in the closed-circuit television (CCTV) room) before the process of giving evidence commences.<sup>16</sup> They introduce themselves and may provide some information about their role and the courtroom. A recent evaluation report suggested that complainants appreciated this opportunity, saying it made them feel less anxious and more informed.<sup>17</sup>

Fuller and longer greeting practices in the Pilot cases were more common in trials in which the complainant was giving her evidence from a CCTV room. Five of the six Pilot cases in which greetings and guidance occurred, were ones in which CCTV was being used. In some of these cases, it was apparent from the audio recording of the courtroom communication that the judges had also introduced themselves to the complainants in the CCTV room before the trials commenced. In these cases, returning to the courtroom and commencing the audio-visual link provided another opportunity for orienting communication to occur. Typically, the judge communicated with the complainant to ensure that she could see and hear people in the courtroom and was ready to commence giving evidence.

The use of the CCTV room was also strongly associated with judges indicating transitions between counsel and before and after adjournments.<sup>18</sup> The case of *Lowrie* provides an example:

*JUDGE: Jihee, can you see and hear me?*

*A: Yeah.*

*JUDGE: Great. We can see and hear you. Can I just confirm a couple of things Jihee. I've just come into that room haven't I, and introduced myself to you?*

*A: Yes.*

*JUDGE: And in the room you've got the Court attendant [name], is that right?*

*A: Yes.*

*JUDGE: And is she sitting on your left or right?*

*A: Left.*

16 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 54. This practice is routine in the Whāngārei District Court Pilot but more variable in the Auckland District Court Pilot. This practice would not necessarily be appropriate in judge-alone trials, however all of the trials in the Pilot are ones in which the defendant has elected trial by jury: Ministry of Justice *Sexual Violence Court Pilot: Guidelines for Best Practice* (Ministry of Justice, Wellington, 2017) <http://www.districtcourts.govt.nz/assets/Uploads/Publications/26a11ed789/Best-Practice-Guidelines.pdf> at [4].

17 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 54–55.

18 This connection between the use of CCTV and care-focussed communication practices was also present in the principal study. Although only two cases of the 30 made use of an audio-visual link, both of those cases included greetings and guidance from the judge to the complainant.

JUDGE: *On your left, all right. And there's another lady in there as your support person. Is that right?*

A: *Yeah.*

JUDGE: *And you understand that she, she doesn't take any part in the question and answers that we're going to go through now. She's just there to keep you company really, isn't she?*

A: *Yeah.*

JUDGE: *Alright and I also mentioned to you the need for you to promise to tell the truth, is that right?*

A: *Yeah.*

JUDGE: *Okay. Well what I'm going to do is I'm going to get [court attendant] now to go through that proper form of words to get you to promise to tell the truth. So, we'll do that and then [the prosecutor] will ask you some questions, all right?*

A: *Yep.*

JUDGE: *And the last thing that I mentioned to you was that even though it won't be very long at about 11.30 we'll be taking a break, okay?*

A: *Yep.*

In all of the Pilot cases, the judge thanked the complainant for coming to court and giving evidence before excusing her at the end of her testimony. In nine of the cases, the judge thanked the complainant by name; for instance: "Thank you Ms Rose, I have no questions for you now we have heard your evidence, so you and your support person can now go, thank you".

### Judicial response to complainants experiencing difficulty or distress in the principal research

Many of the complainants expressed difficulty or distress in the process of giving evidence. Complainants consistently describe recounting what they have experienced as a rape to a room full of critical observers as a highly distressing aspect of giving evidence.<sup>19</sup> That experience of distress is borne out in this research, in which complainants commonly expressed heightened emotionality (such as crying, voice changes, forced breathing) when describing the details of the sexual acts.<sup>20</sup> Many complainants struggled to recall the details of either the alleged assault or what they said to others about it in the aftermath. This inability to recall also tended to trigger heightened emotionality.

19 See for example Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf) at 32.

20 See Chapter Eight at [328](#).

We consider that regular and responsive breaks in the questioning process are a key aspect of assisting complainants who are experiencing heightened emotions. In nine of the 30 cases in the principal study, unscheduled or responsive breaks were offered to, or requested by, complainants who had become emotionally overwhelmed and were struggling to articulate their evidence. In four cases more than one break was initiated, so there were 15 requests or offers for a break in total. Seven of these were initiated by the judge, two by defence counsel, four by prosecution counsel, and in two instances the break was initiated by the complainant herself. Eleven of the 15 breaks offered or requested were allowed by the judge, with two declined by the complainant.

In the case of *Depak*, two breaks were taken in response to Rachel, the complainant, who repeatedly described having difficulty with stress and “going blank”. In this instance, during evidence in chief, the judge intervened in questioning to try to assist her to recall her evidence. When that did not help her, the judge initiated a responsive break:

Q: *All right so tell us about that?*

A: *Um (long pause) he came into my room or, um, [host’s] room and closed the door and then hopped back into the side of the bed and turned me over and said ... (sighing, long pause, sniffing) Sorry, um ...*

Q: *What did he say [name]? Sorry, Rachel, what did he say?*

A: *It’s all right. Um (long pause) sorry my nerves are getting up and ... (very quiet voice)*

JUDGE: *That’s okay, perhaps just tell us what he did. Rather than trying to remember what was said, which you seem to be having difficulty with?*

A: *Sorry.*

JUDGE: *Tell us what happened. What did he do?*

A: *I don’t know what this is. I just keep on going really blank and can’t ...*

JUDGE: *Would you like a wee break?*

A: *Could I just have a breather please? (heavy breathing, sniffing, tissues rustling)*

JUDGE: *Yes. Members of the jury I think we will just take a wee break. So, if you would like to retire to the jury room?*

JUDGE: *Right. We will just take an adjournment of five minutes just to give you a chance to settle down and just take your time when you’re giving your evidence. There is no rush. I know it isn’t something you do every day and so it might be causing you to have some memory black outs but you just need to quietly sit and concentrate. Ok? So, I’ll give you a break for five minutes and then we’ll see how we go after that. Alright I’ll adjourn.*

Responsive breaks were more likely to be requested or required during cross-examination than evidence in chief, and were often consequent to direct, repeated challenges to the

complainant's credibility or while counsel was putting the defendant's version of events to the complainant. Complainants clearly found those types of questioning difficult to tolerate.<sup>21</sup>

Increasing the number of planned breaks or shortening the length of questioning periods by adjusting adjournments, were also ways in which some judges proactively assisted distressed complainants. For instance, in five cases in the principal research, in which complainants were obviously struggling emotionally, the judges proactively adjusted scheduled adjournments to assist them. Such adjustments included commencing or adjourning court early to accommodate additional, earlier or longer breaks. In one case, in which multiple responsive breaks were required, the duration of scheduled adjournments was reduced to accommodate the increased frequency of responsive breaks. Consequently, these responsive breaks were provided without significantly extending the time the complainant was required to be at the courthouse.

In some cases, the judge adjourned the first day of evidence early when it was clear that the complainant would have to return the next day. In *Moss*, the complainant, Vivienne, had become increasingly distressed as evidence in chief progressed. Returning from the afternoon adjournment, the prosecutor initiated the possibility of an early finish to the day and the judge agreed to delay the start of cross-examination until the following morning. The prosecution in this case drew attention to the fact that even though the complainant had not begun giving evidence until just before the lunch adjournment, she had been at the courthouse and waiting to be called all day.

In one case in the principal research, the complainant declined the offer for a break, preferring to pause for composure and then continue with questioning. However, in *Kingsford*, the complainant, Deb Smits, a sex worker, was being directly challenged about her evidence by defence counsel, leading her to express anger and then request a break. The judge in this instance did not allow that request, instead offering an explanation of the underlying rationale for the questioning process that was causing her distress:<sup>22</sup>

**DEFENCE:** *We all behave a little strangely when we're having sex though, don't we?*

**A:** *I don't. I don't slap someone. I don't hurt them. I don't keep hurting someone when they ask me to stop. (raised voice)*

**DEFENCE:** *You're not reciting poetry to a client, are you? You're not –*

**A:** *What, so because of my industry I'm allowed to be thrown around every now and again? Can I please have a break? (angry tone, sound of hand slapping hard surface)*

**JUDGE:** *Just stay there, have a glass of water, just pause for a minute.*

21 See for example Chapter Eight at 354.

22 The duty of the cross-examiner to "put the case" to the witness: section 92 of the Evidence Act 2006. See further Chapter Eight at 326.

A: *(breathing out, silence for two minutes)*

JUDGE: *Ms Smits I know this is not easy. [Defence counsel] has a job to do. He is obliged to put his client's version of events to you. So, I have to allow him to continue with those questions and you just have to answer them as honestly as you can, as you have, I'm sure, have been, and we will keep going. There will be a break obviously at half past 11. All right?*

A: *(no audible answer).*

JUDGE: *Okay. Thank you [defence counsel].*

In *Walters*, the 17-year-old complainant's request for a break was completely ignored, unremarked on, and the cross-examination continued.<sup>23</sup> In other cases, pauses, reassurance and explanations provided before complainants reached a state of high distress did appear to assist some complainants, allowing them to regain their composure and continue giving evidence, for example:

JUDGE: *Well just take your time. It's alright. Just take your time. Just think about the questions that you are being asked and when you feel ready see how you go. There are some tissues there if you would like to use those.*

A: *(wet sniffing, nose blowing)*

JUDGE: *Just stop, just take your time. (long pause) Are you okay?*

A: *Sorry, yeah, I'm all right. I'm just trying to run through it in my head, sorry.*

This kind of practice is consistent with the findings and recommendations made in the Inns of Court College of Advocacy guidelines for questioning vulnerable witnesses.<sup>24</sup> Research suggests proactive and responsive breaks are an essential aspect of the type of trial management that should be practised in cases in which witnesses are at risk of harm from the trial process. However, a change of pace, a different line of questioning or a pause may be appropriate, as some witnesses will want to complete their evidence as soon as possible. As in a number of examples above, in order to manage the conflicting imperatives of frequent breaks and minimising time at the courthouse, checking with the witness as to their preference is desirable.<sup>25</sup>

We are also of the view that good judicial practice with adult complainants in rape cases includes providing an open invitation to them to signal when they are experiencing difficulty, ongoing monitoring and checking for stress, allowing support people – especially professional workers – to signal the need for breaks, and creating or allowing additional unscheduled

23 See further Chapter Eight at 371.

24 The Council of the Inns of Court *Raising the Bar* (2019) [www.icca.ac.uk/raising-the-bar/](http://www.icca.ac.uk/raising-the-bar/) at 62.

25 At 62.

breaks as required.<sup>26</sup> While we saw these practices in a number of cases, especially in the pilot study, the invitation to ask for a break is only meaningful when it can be acted on; hence, we believe there is a need for the complainant to feel confident to do so, by, for example, some individualised communication with the judge before beginning her evidence.<sup>27</sup>

### Judicial response to complainants experiencing difficulty or distress in the pilot study

As with communication practices, there was a pattern of greater judicial attentiveness to complainant emotionality or arising needs in the Pilot cases. The *Sexual Violence Court Pilot: Guidelines for Best Practice* includes guidance to judges on ensuring flexibility during complainant evidence. The guidelines specifically refer to the practices of ensuring regular breaks and the flexible use of earlier and later start and finish times on days when complainants are giving evidence.<sup>28</sup> Judges in the Pilot have also received specialised training including information on how complainants experience sexual violence trials and what practices of support may assist them through the evidence giving process.

Offers or requests for responsive breaks occurred in seven of the 10 cases in the pilot study. Eight responsive breaks were taken in six of the cases. In one case, the judge offered a break but the complainant declined. Judges were more proactive with offering breaks in response to heightened emotionality and there was a pattern of ease from judges and counsel in responding to requests for breaks. Judges also signalled to complainants that they could request breaks at points other than when complainants were expressing high levels of distress. For instance: “Ok Terri? ... If you need another break, just let us know, no problem”. This type of checking with complainants as to their emotional state was relatively rare in the principal study cases, but comparatively frequent in the Pilot cases. In other examples, judges did this by asking for example: “Are you okay to continue?” or “Are you okay carrying on?”.

Complainants in the Pilot appeared to be well-informed about their ability to request breaks and willing to take up that opportunity as needed. The above judicial practices we believe would have supported that willingness, and it is likely that they would have been told they

26 There were other examples of judicial care offered to complainants through the evidence giving process. For instance, in one of the cases in which the complainant did not have a support person, the judge ensured that the police officer in charge was able to be with her during the adjournments. There was an instance of a judge allowing the day to run over time in order that the complainant could finish her evidence that day and not have to return the next day.

27 As noted above, in only two cases did complainants in the principal study ask for a break and on both occasions the request was denied or ignored. In five other cases, the complainant was reminded by the judge or by counsel that she may ask for a break, but she did not do so.

28 *Sexual Violence Court Pilot: Guidelines for Best Practice* (Ministry of Justice, Wellington, 2017) at [21] <http://www.districtcourts.govt.nz/assets/Uploads/Publications/26a11ed789/Best-Practice-Guidelines.pdf> – see also Crown Law Solicitor-General’s *Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [11.5].



could request breaks in court preparation meetings with prosecution counsel, victim support workers and/or judges. The following examples of complainant-initiated requests for breaks and ease of responsiveness are taken from the case of *Cropp*:

CROWN: *What was your reaction when you woke to Jeremy on top of you with his penis in your vagina?*

A: *Um. I was – I didn't have a reaction. I passed out.*

CROWN: *Was there anything that you said to him?*

A: *(long pause) No.*

CROWN: *How come?*

A: *I don't know. Just, I think it just felt like a bad dream, I don't know.*

CROWN: *Can you describe the way that your body or your mind was feeling?*

A: *Can I have a break please?*

CROWN: *Of course.*

JUDGE: *Yes, you may.*

A: *Thank you.*

JUDGE: *Just go with your support person, just go out to the adjoining room. Members of the jury, just take a short break, I'll just invite you to retire to the jury room please.*

...

DEFENCE: *Because Jeremy will give evidence to say that you not only put his hand between your legs, but you started rubbing his hand against your vagina over your underwear.*

A: *(heavy sigh) No. Please can I have a break?*

JUDGE: *Yes, you may.*

This judicial attentiveness did appear to assist complainants to self-manage their emotional state. In four of the Pilot cases, the complainant or her support person requested a break after a period of increasing agitation but before the complainant demonstrated high levels of distress such as sobbing. In all cases in the Pilot in which the complainant or their support person asked for a break, it was given. Not all complainants wanted breaks additional to scheduled adjournments, but in the cases where they did, most complainants were not required to give evidence for more than an hour at a time.

The *Guidelines for Best Practice*, specialist training and trial management processes in the Pilot appear to be contributing to increased judicial support for complainants. Our observation is that there was a lower proportion of cases in the pilot study, as compared to the principal study, in which complainants demonstrated very high levels of emotionality. This might

indicate that these initiatives and practices of judicial care are contributing to reduced distress and re-traumatisation for some complainants.<sup>29</sup> There is still variation in judicial practice with regard to communicating and responding to complainants in the pilot study cases but, overall, judges seemed more attuned to the welfare and needs of complainants. None of the practices adopted in the Pilot have raised issues with regard to unfair prejudice, given that aspects of the communication occurs in the absence of the jury, and with the knowledge of the defendant.<sup>30</sup>

### Prosecution and complainant care practices: in the principal and pilot studies

The prosecution also has a role in supporting complainants through the process of giving their evidence in court. Like judges, prosecutors can engage in caring and compassionate communication and this may help complainants to feel calmer and may contribute to their giving better evidence. They also have a role in responding to complainants' arising needs during evidence in chief, which can be distressing and difficult for some complainants. However, complainants have reported being disappointed with the business-like and aloof attitude they perceive in the prosecutor.<sup>31</sup> The case materials in these studies illuminated the nature and style of interactions between prosecuting counsel and complainant in the courtroom.

The prosecutors' communication with complainants was sparse and there was little evidence of pastoral care for complainants occurring in the courtroom in either of these studies. This may reflect two defining aspects of the prosecution-complainant relationship. One aspect is the role of Crown counsel to prepare complainants for the process of giving evidence before trial. The other is their duty to the court to conduct the prosecution impartially. Nevertheless, we would argue that Crown counsel can – and sometimes do – proactively engage in compassionate communication and considerate practice in their interactions with complainants in the courtroom. Doing so can support complainants to give their best

29 See also Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019). However, it is important to note that both of our studies had relatively low numbers of complainants as participants, and that there are many other factors that can influence rape complainant experience of giving evidence in jury trials.

30 In *A (CA990/2017) v R* [2017] NZCA 278 (application for leave to appeal declined: *A (SC80/2017) v R* [2017] NZSC 136), a ground of appeal was the trial judge's "unfair preference for K [the complainant] over A [the appellant]", at [79]. This included concerns that the judge had thanked K for her "dignity and patience" at the end of her evidence in chief. The Court of Appeal was unconcerned about the comments, noting they were not made in front of the jury: at [81].

31 See Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 94; Elisabeth McDonald " 'Real Rape' in New Zealand: Women complainants' experience of the court process" (1997) 1 Yearbook of New Zealand Jurisprudence 59; Sara Payne *Rape: The victim experience review* (Home Office, London, 2009); Chapter Four in Amanda Konradi *Taking the Stand: Rape survivors and the prosecution of rapists* (Praeger, London, 2007).

evidence and reduce the risk of re-traumatisation. These two concerns are related – high levels of stress can negatively impact on recall and cognitive clarity, and cause or confound traumatic stress.<sup>32</sup>

The patterns and examples of Crown counsel’s interpersonal interactions with complainants in the courtroom are presented here with a dual purpose. Firstly, to explore an aspect of why complainants so consistently report feeling abandoned in the courtroom. Secondly, to encourage careful consideration of the premise that the impartial conduct of criminal proceedings necessarily entails an interpersonal style of detached formality.

For the purpose of this analysis, we defined prosecution-complainant interaction as verbal communication by counsel to the complainant that was not questioning or instruction about evidence. The following types of interactions were observed in at least some of the cases: greeting the complainant or signalling the beginning of her evidence in chief; explaining the microphone or the need to speak loudly to be heard; transitioning a change in proceedings, such as viewing the evidential video statement or the end of evidence in chief; inquiring after the complainant’s well-being; and signalling the end of re-examination.

In the principal study, there were seven cases in which none of this type of communication occurred.<sup>33</sup> In only five cases did Crown counsel speak to the complainant for these purposes four or more times. Two counsel greeted the complainant with “good morning” or “good afternoon”. In nine cases, counsel communicated to the complainant that they were about to begin asking questions, usually in combination with information about the microphone in the witness stand. This example is taken from the case of *Yamada*:

**Q:** *Ms Sik I’m going to be asking you some questions this morning. See that microphone in front of you?*

**A:** *Yes.*

**Q:** *It doesn’t make you louder in this courtroom, okay, it just takes what you’re saying to someone who’s typing it in another building. So, before when I asked you see that courtroom, you sort of nodded your head?*

**A:** *Yes.*

**Q:** *I need you to answer verbally to every question because they’re in another building and they can’t see you nodding or shaking your head, okay?*

**A:** *Okay.*

32 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 14.

33 This information was gathered from the audio made available to us – it does not take account of what interaction occurred between the prosecutor and complainant pre-trial, prior to her evidence beginning, or after the conclusion of her evidence.

Q: *And I need you to speak loudly, about as loud as I am, so that the jury can hear you.*

A: *Okay.*

As with judicial greeting and guiding practices, there was more orienting communication from counsel when CCTV technology was used. The following example is taken from the case of *Ahmed* and is the longest interpersonal communication by prosecution counsel to a complainant in the principal research:

Q: *Now Ms Anae, I'm going to be asking you some questions and we're relying on this technology to make sure that you can hear?*

A: *Yep.*

Q: *Can you just – can you indicate that you can hear me clearly please?*

A: *Yeah.*

Q: *All right and if for any reason at any time you can't hear me, can you let us know?*

A: *Yes, ma'am.*

Q: *Now I understand you're in your room with a staff member from the Court, is that correct?*

A: *Yes.*

Q: *All right and that's Raewyn, she's going to be keeping an eye on the TV system to make sure that it's operating properly?*

A: *Yeah.*

Q: *And if for some reason you need a break or anything like that, then you can perhaps indicate to myself or to Raewyn as we're going through your evidence?*

A: *Okay.*

The prosecutor usually indicated the end of evidence in chief by asking the complainant to remain in the witness stand for further questions. These communications tended to be minimal and instructive, for instance, "Please remain there" or "If you can just stay and answer any questions please". Sometimes these transitional formalities incorporated acknowledgements to the complainant in the form of thanking or using the complainant's name: "Thank you. Please remain and answer any questions" or "All right. Can you just remain there Ms Anae and the other lawyer will have some questions for you?" In some cases, Crown counsel contextualised or personalised the transition from evidence in chief to cross-examination by letting the complainant know what was going to happen next; for instance:

*Thank you, Ms Sik. I don't have any further questions for you at the moment but you are now going to be asked some questions by the accused's lawyer and then I might have some questions at the end for you. Ok?*

Re-examination offered further opportunities for orienting or reassuring communication. In one case counsel did this by providing an indication about progress; in this instance at the beginning of re-examination: “Thank you. It’s been a long day Mrs Zhang. I don’t have many questions for you”. At the end of re-examination, 10 Crown counsel told the complainant that they had no further questions. Eight counsel thanked the complainant at the end of re-examination. Five did so using her name (16% of the 30 cases). In 12 cases, counsel informed the judge when they had no further questions for the witness but did not address the complainant. Although this latter form is technically adequate, we favour a construction that informs and makes a request, and, where possible, includes addressing the complainant by name. In only 16 of the 30 cases in the principal study (53%) did the prosecutor use the complainant’s name when addressing her for any purpose, or while asking her questions.

Reassurance and responses to complainants’ arising needs in the courtroom by the prosecution was also relatively uncommon – perhaps out of concern for attracting criticism from the judge for seeking to engender emotional support or sympathy for the complainant, an action that would be at odds with their duty of impartiality. Nevertheless, some counsel did check with the complainant that she was coping with the questioning process or offer her a word of encouragement when the jury had left the courtroom for an adjournment. There were also three instances of counsel checking with the complainant that she had somewhere to go or someone to be with during the lunch adjournment. One prosecutor suggested a nearby park for a walk during the lunch break.

There were other ways in which the prosecutor offered some help to the complainant, such as by initiating responsive breaks for complainants who were clearly distressed.<sup>34</sup> There were a few occasions when counsel signalled to complainants that a difficult question was going to be asked; for instance: “This is very personal but I need to ask ...” or “My question will irritate you but ...”. Most counsel were polite and kind in their tone of communication. However, other than a few exceptional instances, reassurance and assistance in the courtroom from the prosecutor in the principal study cases was minimal.

The same dynamic was apparent in the Pilot cases. There were two instances of the prosecutor initiating a request for a break on behalf of the complainants. There was some evidence in these cases of counsel checking on the well-being of complainants who were highly distressed during adjournments. There were few other instances of proactive assistance or pastoral care in the courtroom in the Pilot cases. However, judges in these trials were much more proactive in relation to ensuring complainant well-being. In addition, in half of the Pilot cases the complainant gave evidence via CCTV and this meant there were more opportunities for supporting complainant well-being outside the courtroom. Taken together, there was arguably less need or opportunity for Crown counsel in the Pilot to proactively respond to complainant difficulty.

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34 See above at [71](#).

However, the style of the prosecution's communication with complainants in the pilot study tended to be warmer. In a greater proportion of cases (70%), counsel addressed the complainant by name, offered thanks or signalled progress within the trial process. However, there were still cases in the pilot study where this type of communication style was largely absent. Our comments, above, about improving and increasing the use of compassionate and guiding communication, therefore, remain relevant for the prosecutors in the Pilot.

In both studies, the prosecutor may have provided pastoral care to complainants outside the courtroom, either during pre-trial preparation or in the witness room before or after evidence. Some Crown counsel meet with the complainant just before they give evidence to check that they are adequately coping with anticipating being in court and are ready to proceed. There has been an expectation that counsel meet with complainants in the weeks or days before trial to explain the role of the witness, how the evidence will progress and to answer any procedural questions. Assistance to complainants in their role as witnesses is understood to occur principally in this context. However, this practice has historically been inconsistently implemented, and when it does occur, is often experienced as perfunctory or inadequate by complainants.<sup>35</sup>

On 1 July 2019 the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* came into force. These new guidelines have increased and elaborated the expectations on the prosecutor to prepare complainants for the experience of giving evidence. This aspect of the *Guidelines* was informed by the views of victim advocates,<sup>36</sup> and early observations from our research.<sup>37</sup> Our suggestions were integrated into the draft, and the *Guidelines* now incorporate a number of complainant-centred practices. For example, in relation to proactively supporting complainants through the use of additional breaks, the *Guidelines* suggest that prosecutors should seek breaks for a complainant when she is becoming too tired or distressed to concentrate, and that "[p]rosecutors should try and avoid the witness being required to decide whether or not they need a break".<sup>38</sup> They also suggest that if the prosecutor identifies a complainant who is particularly vulnerable ahead of trial, they should seek agreement in advance to additional breaks being taken.<sup>39</sup>

35 See for instance Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 62–66; Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 93.

36 Letter from Te Ohaakii a Hine – National Network Ending Sexual Violence Together (Justice Working Group) to Brendan Horsley (Deputy Solicitor-General) regarding the draft Guidelines for Prosecuting Sexual Violence (31 January 2019).

37 Letter from Elisabeth McDonald to Brendan Horsley (Deputy Solicitor-General) providing peer review of the draft Guidelines for Prosecuting Sexual Violence (25 January 2019).

38 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [12.3].

39 At [12.4].

Crown counsel who appear in sexual offending jury trials have recently received training on the *Guidelines* and counsel appearing in the Pilot have been using equivalent protocols. That suggests that complainants should receive increased pre-trial preparation and more prosecutorial responsiveness during trials in the future. However, in light of the limited amount of personalised and supportive communication the prosecutors demonstrated with complainants in the courtroom – particularly in the cases in the principal research, but also to some degree in the Pilot – we invite consideration of how this aspect of complainant care might be strengthened. The examples above demonstrate that this need not be complicated nor necessarily demonstrate partiality. Rather, the suggested communication practices go unnoticed in courtrooms when they currently occur, precisely because they are unremarkable. We also recommend that Crown counsel receive training in trauma-informed and good practice approaches to working with victims of sexual violence.

### ***Assisting complainants to give their evidence: the importance of pre-trial preparation and prosecutorial best practice***

Analysis of the transcripts in these trials highlighted some aspects of the process of giving evidence that repeatedly caused difficulties for complainants. Issues related to the admissibility of evidence and the content of questioning are analysed in other chapters.<sup>40</sup> This section focusses on the way that some aspects of courtroom questioning contributed to unnecessary difficulty or distress for complainants and may have reduced their perceived credibility or the accuracy of their evidence. It commences by highlighting the ways in which a lack of understanding about social media and digital technologies by some counsel and judges tended to position complainants as “unknowable adolescents” and may have undermined their credibility. It then examines two key points of tension for complainants during evidence in chief: giving detailed descriptions of the sexual acts involved and viewing and answering questions about exhibits. Finally, we discuss a range of language and communication difficulties that arose during the complainants’ evidence, including examples of overly complex language, difficulties with literacy, and culturally specific ways of communicating.

Prosecutors play an important role in assisting complainants to participate at trial and to give their best evidence.<sup>41</sup> In particular, they lead the evidence in chief of complainants, which usually includes asking complainants to describe what happened and their state of mind at the time. It may also involve playing the complainant’s video interview (EVI) and will often include questions about exhibits such as photographs of the scene or text messages between her and the defendant. As described above, prosecutors are required to present the Crown

40 See Chapters Five, Six, Seven and Eight.

41 See Elisabeth McDonald “The Views of Complainants and the Provision of Information, Support and Legal Advice: How Much Should a Prosecutor Do?” (2011) 17 *Canterbury Law Review* 66.

case in an objective manner and are not advocates on behalf of the complainant. Leading questions are usually prohibited during evidence in chief and, instead, open questions are used to elicit a detailed account of what the witness can recall of the relevant events.

The trials in both these studies were conducted under the *Solicitor-General's Prosecution Guidelines*.<sup>42</sup> The *Solicitor-General's Guidelines for Prosecuting Sexual Violence (Guidelines)* that came into force from 1 July 2019, as noted above, operate in addition to the general guidelines for trials commencing after that date.<sup>43</sup> They were developed in response to complainant dissatisfaction with the degree and type of preparation for court they received, especially with regard to the lack or paucity of contact with counsel before trial and subsequent feelings of being unrepresented and unsupported while giving evidence.<sup>44</sup> Consequently, they provide counsel with additional guidance on balancing the effective prosecution of sexual violence cases with the compassionate treatment of complainants.<sup>45</sup>

The new *Guidelines* introduce an expectation of increased pre-trial information provision to, and consultation with, complainants and give specific guidance on preparing for trial including arranging alternative ways of giving evidence,<sup>46</sup> assessing a complainant's need for communication assistance and ensuring court education is provided. They contain a prohibition against discussion of evidential matters at any pre-trial meeting between the prosecutor and complainant.<sup>47</sup> However, as the examples below demonstrate, there are

42 Crown Law *Victims of Crime – Guidance for Prosecutors* (6 December 2014) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines). Prosecutors also have duties to complainants under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and the Victims' Rights Act 2002.

43 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines)

44 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [5.80]–[5.84]; Elisabeth McDonald "Complainant desire for information, consultation and support: How to respond and who should provide?" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011); Elaine Mossman and others *Responding to sexual violence: environmental scan of New Zealand agencies* (Ministry of Women's Affairs, Wellington, 2009) at xxii, 77 and 121; Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating the Views of Te Ohaakii o Hine – National Network for Ending Sexual Violence Together* (Ministry of Justice, Wellington, 2009).

45 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [5.83]; Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at 3 (Attorney-General's Introduction).

46 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.10.1]. See also the proposed amendment to the Victims' Rights Act 2002 in clause 24 of the Sexual Violence Legislation Bill 2019 and Recommendation 6.1 in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

47 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.8.2].



aspects of preparation, prosecutorial practice and inter-personal rapport between the complainant and the trial prosecutor that could assist complainants and would not breach that prohibition, but do not seem to form part of current practice. We make a number of recommendations to expand the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* to take account of the difficulties we observed and we recommend additional aspects of training for counsel prosecuting sexual violence trials.

Court Victim Advisors (CVAs) also support complainants going to court. Each Aotearoa New Zealand courthouse where jury trials are held has a nominated regional CVA dedicated to advising sexual violence complainants and witnesses.<sup>48</sup> CVAs provide complainants with courtroom education and liaise with them about dates and processes related to their cases. In very limited parts of Aotearoa New Zealand independent community service providers offer psycho-social court preparation and support services to sexual violence complainants. Complainants in recent research spoke highly of the benefits of this kind of psychological and practical preparation,<sup>49</sup> and stakeholders consulted for the Pilot evaluation were also supportive of increased service availability.<sup>50</sup> The New Zealand Government has recently announced that, subject to budget decisions, it intends to extend these services nationally.<sup>51</sup>

We support the expansion of community based court preparation services to provide support and care to any sexual violence complainant who wants that service. The examples and discussion below demonstrate that those services may be best placed to support complainants to manage the psychological and personal aspects of preparing for giving evidence. However, the very limited availability of these services to date means that there is a lack of clarity as to how the prosecution, CVAs and psycho-social service providers will work together to ensure role-appropriate but seamless support to complainants.<sup>52</sup> The intended expansion of services, alongside increased guidance and training for those who prosecute sexual violence cases, offers an opportunity to address this gap and we provide some observations based on the trials in these studies.

48 In smaller communities or in courthouses where jury trials are held less frequently, the Court may be serviced by a CVA physically based at another location.

49 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 58.

50 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 46.

51 *Proactive Release – Improving the justice response to victims of sexual violence* at [71] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>

52 There are some locations in which CVAs and Crown counsel meet together occasionally to discuss service provisions arrangements. Some prosecutors suggested to us during the consultative workshops this has facilitated open communication about issues concerning complainant needs and that they find this useful. However, these arrangements are ad hoc rather than structurally supported.

### Understanding social media and digital technology

Social media was a common source of difficulty and miscommunication during complainant evidence in both the principal and pilot study cases. Social media was an everyday part of many of the complainants' lives and communications between the complainants and defendants on social media platforms were often entered as exhibits. Unfortunately, counsel and judges were often unfamiliar with how those platforms operated, how communication occurred on them and their language norms and forms. This led to unnecessary and distracting questioning, misunderstandings and complainants having to try to explain norms or protocols. These kinds of exchanges tended to create an impression of the complainant as "other" to the sensible and mature social world of the courtroom, an impression that was exploited by some defence counsel to suggest the complainant lacked credibility. These two extracts are taken from the evidence in chief of the complainant in the Pilot case of *Lino*:

Q: *And how would you communicate then?*

A: *Just on the same platform as this.*

Q: *Just so that we all understand –*

A: *On Messenger, on Facebook.*

Q: *So, when you're talk – just so that we understand, when you talk about a platform, what are you describing?*

A: *Like this app, this Messenger, Facebook.*

Q: *And I don't think my friend will object, for leading, but, just so we can make sure, Messenger is an application that you have on your phone?*

A: *Yep.*

Q: *And you can use it if you have access to –*

A: *Wi-Fi.*

Q: *Wi-Fi. Thank you.*

JUDGE: *And it enables you to send emails?*

CROWN: *And it enables you to send emails or sort of like a text message?*

A: *Just like a text message.*

Q: *Does Your Honour want that explored any ...*

JUDGE: *No. So, when you're talking about calling ...*

CROWN: *Yes, so, when you're talking about calling, you can use that application to make a call to another phone?*

A: *Yep.*

Q: *Or to another account?*

A: *To another account.*

JUDGE: *So that's a good old-fashioned phone call?*

CROWN: Yes, Your Honour. So, you can use the application to make what we would call a phone call without applications?

A: Yep.

...

JUDGE: If you look on that page which begins at the bottom [date], the third top text has the, “Kinda L-M-A-O-O-O-O” what is that L-M-A-O? You used it earlier, what does that mean?

A: It’s an L-M-A-O, it’s just a, stands for laugh my ass off.

CROWN: There’s a reference to O-M-G but what does that normally stand for?

A: Oh my gosh, oh my god.

Q: Sorry it’s just that some of us don’t know these abbreviations so I just want to make sure that everyone – and I-D-K?

A: I don’t know, that’s that abbreviation for it.

Q: That’s the abbreviation for I don’t know, okay, that you don’t know, okay. So, I’ll produce that Your Honour as [exhibit number].

The need for complainants to explain how platforms operated or were connected, the types of communication mediums available on them and to spell out conversational acronyms occurred repeatedly. This tended to engender a dynamic in which the complainant was expected to explain herself or her social world as if it were abnormal, suspect or laughable.

As in the above example, several complainants were asked to explain acronyms that contained obscenities and that required them to swear in court. Social media acronyms often have obscenities contained in their long form but are not usually used as obscenities – rather they are used to convey an emotional or embodied experience or as an interrogative. For instance, the acronym “WTF”, derived from the phrase “what the fuck?”, conveys incredulity not insult.

Listening to these complainants explaining these terms was jarring and this was particularly pronounced in the younger and more quietly spoken women. Sometimes complainants were asked to explain what an emoji or emoticon was and to interpret the emotions that various emojis/emoticons are intended to convey – even if they were not ones they had used in their own communications.<sup>53</sup> Again, this had the effect of connecting those emotions or descriptions with the complainant and this was particularly problematic when they were obscene or sexual. This effect was emphasised by some defence counsel who repeated questions about acronyms or emojis, requiring complainants to repeat obscenities in front of the jury.<sup>54</sup>

53 Emoticons are typographics that convey emotional states, for instance ☺, typically used in written communication. Emojis are ideograms and smileys in picture form typically used in electronic messages and web pages, including facial expressions, common objects and symbols, places, animals, weather and so forth, that convey feelings, experiences or meaning.

54 See further Chapter Eight at 373.

Questioning about terms of endearment and stylised selfies also showed up the gaps in understanding about the norms of social media. Complainants were repeatedly challenged in cross-examination about the meaning of common communication practices in social media. For example, the use of Xs to sign off texts, frequent uses of terms of endearment, winking emojis and multiple texts were all suggested as signals of intimacy and sexual intention. Selfies that showed the complainant happy or in the same photograph as the defendant were used to suggest that the complainant could not possibly be a victim of rape.

The first example excerpt below is from *Young*, in which the defence theory of the case is that the complainant, Erin, has accused the defendant of rape in order to hide consensual sex with another man with whom she is friends, from her intimate partner. Here Erin is being questioned about texts between her and the male in question:

Q: *Okay well there's about 30 something texts on the [date] before you'd seen [the defendant] at the party –*

A: *Yes.*

Q: *– that was a typical day?*

A: *That was his birthday.*

Q: *But that was a typical day?*

A: *Yes and no, it was his birthday so we were talking more about I guess the night and everything.*

Q: *And the first text has a kiss at the end of it from you doesn't it?*

A: *Yes, it does.*

Q: *That is a degree of intimacy with someone, a male or female isn't it?*

A: *No.*

Q: *No?*

A: *I send it to a lot of people.*

Q: *Okay and then he's texting a cute and smiley face?*

A: *Yes.*

Q: *Is it a degree of friendship that you, or expectation on his part isn't it?*

A: *What do you mean?*

Q: *And back then, he liked you?*

A: *I don't know.*

Q: *Okay so you don't agree that throughout the texts this is someone who wants to go out with you?*

A: *I didn't know.*

Q: *Okay, you're just blind to it?*

A: *Well I always send smiley faces and "X"s to all my friends.*

This second example is taken from the case of *Gamage* in which the 17-year-old complainant alleges being raped on the second day of a work trial in the defendant's business:

- Q: *But what's changed isn't it, is that you've gone from a text message, text messages essentially talking about work and "I hope you're okay", and "Thank you so much", and at the end of the day Mr Gamage text you saying, "Sleep well, sweet dreams", and your reply is, "Same to you" with a kiss?*
- A: *Yeah.*
- Q: *So, by the end of the day your relationship with Mr Gamage had changed, you'd become a lot more familiar and –*
- A: *Yeah, I just thought he was a nice person, yeah.*
- Q: *And the first text message that you send on the next day is, "I'm at the hairdressers now, they're gonna do my hair now, is that okay honey?"*
- A: *Yeah.*
- Q: *He replies, "Yes darling"?*
- A: *Yes.*
- Q: *Were you two calling each other sweetheart and darling throughout the previous day?*
- A: *He called me darling when he first met me so –*
- Q: *Your text messages when you're at the hairdresser are, "I'm at [place] love"?*
- A: *Mhm.*
- Q: *He replies with six or so kisses?*
- A: *Yes.*
- Q: *You reply with 10 or so kisses and a smiley face?*
- A: *Yes.*
- Q: *"It's expensive darling kiss", and so it goes on?*
- A: *Yes.*
- Q: *I put it to you the only reason that your text messages have changed in their tone so much is because the whole entire basis of your relationship with Mr Gamage has changed at this point?*
- A: *Yeah, well I was just excited that I had a job so, yeah.*
- Q: *This is not the way you would text an employer is it?*
- A: *No but I just – I'd talk to a friend like that, I guess.*
- Q: *Well you talk to someone that you've made an arrangement to have sex with later in the day like that?*
- A: *No. I was just being friendly.*

As in these two examples, the complainants struggled to assert the realities of their social environment and refute the meanings that were suggested by defence counsel.

Some prosecutors did ask questions during evidence in chief to give complainants an opportunity to explain the meaning or purpose of social media communication, as in this extract from *Carter* which relates to a text exchange between the complainant and defendant in the hours after the alleged rape:

- Q: *Can you tell us what you said and what you meant, by that?*
- A: *Um, I said, "Fucked did time trials," which meant that I was absolutely exhausted from playing sport.*
- Q: *And then the next text message?*
- A: *Was him sending me a sad face.*
- Q: *And then the next message, I see that in the text message there's a blank. What do you think that text was?*
- A: *Me sending him a picture of the dog, it was a PXT message.*
- Q: *And then over the page, what was his reply to the picture you sent?*
- A: *He said it was cute.*
- Q: *And what was your reply to him?*
- A: *It was cuddly.*
- Q: *And what was his reply to you?*
- A: *Um, an "X", which –*
- Q: *What did you think it meant?*
- A: *– symbolises as a kiss.*
- Q: *And what did you reply to him?*
- A: *I said, "Yep, he giving me them too."*
- Q: *Now this exchange, what was the purpose of you sending him the picture of the dog and saying, "Cuddly," and, "Yep, he giving them to me too?" Can you explain that for the jury?*
- A: *Um, I just didn't really know what was going on. Like, I was very upset and I just, I suppose at that point I didn't want him to know how upset I was 'cos he knew basically whereabouts I was [ ] and I – and if he knew that I was upset I thought that he might come round, and I didn't want him coming round.*

However, examples like this were relatively rare, as were clarifying questions in re-examination. Prosecutors will have access to the same exhibits on which this type of questioning is based. We are of the view that there were many opportunities for prosecutors to ask complainants to contextualise their social media communications before facing questioning in cross-examination, and recommend that they need to more proactively do so. Re-examination may also offer similar opportunities.

This is unsurprisingly not the norm in a context in which there is a broad unfamiliarity or suspicion about the operation and norms of social media in the courtroom. In several cases, judges and prosecuting counsel made off-the-record observations that they did not understand social media. Yet this lack of knowledge and familiarity repeatedly led to difficulties for complainants, may have affected perceptions of the complainants' credibility and in some cases led to errors and delay. For instance, in one case in this study, prosecuting counsel entered an exhibit comprising text messages, but perhaps being unfamiliar with emojis, was not aware that it had been printed without the emojis that defence counsel intended to question the complainant about. The error was identified, but caused delay during the complainant's evidence while it was corrected.

In some cases, it may be necessary for juries to have aspects of how social media operates explained to them. However, this responsibility should not fall to complainants. Nor should lack of understanding about social media by members of the court cause delay or inconvenience to them. We recommend that the use of an agreed statement of fact<sup>55</sup> be considered as a mechanism for providing the judge and jury with information about technology, platforms and social media communication, including acronyms, that they will need in order to understand the evidence that is being given in the case. We additionally recommend that an education programme about social media be developed and provided to judges and counsel to increase their familiarity with this technology and reduce the difficulties that lack of understanding is currently causing in the courtroom. Increased knowledge in this area should assist the prosecution to be more aware of the lived realities of younger complainants especially and may assist with rapport and help complainants to feel more supported by counsel.

### **Ensuring adequate preparation for evidence in chief**

Two particular aspects of evidence in chief recurrently caused difficulty for complainants. Firstly, describing the sexual activities that took place, and secondly, viewing and responding to questions about exhibits. This is not surprising given that both aspects require complainants to visualise or specifically recall the events themselves and describe them in detail for the jury. The number of complainants who struggled to navigate these passages of evidence in chief was striking. We, therefore, provide some examples and explanation of these difficulties.

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<sup>55</sup> See section 9 of the Evidence Act 2006 in Appendix Two.

We then consider some mechanisms that could be used in the pre-trial preparation process, as well as during the complainant's evidence in chief, in order to ameliorate any difficulty or distress.

### Describing the sexual activities in question

A repeated difficulty during evidence in chief related to the use of language to describe genitalia and sex acts. This was particularly the case in trials in which the complainant's video statement to the police was not played as part of her evidence in chief. Talking about unwanted sex acts in front of strangers and people of high social status was clearly challenging for some complainants, particularly some of the younger women. Prosecutors need to elicit detailed descriptions of the sexual activity and body parts involved. They need to do so using open questions so that the complainant uses her own language but also offers a description of what happened that can demonstrate the physical aspects of the charges; for instance, digital-genital or oral-genital contact, or penile penetration of the genitalia or anus.

However, in some instances, complainants appeared not to have the vocabulary required to do so, or were too uncomfortable to use the words they did know. The following example is from evidence in chief of an 18-year-old complainant in the case of *Depak*:

Q: *You told us he put his – a hand down your pants?*

A: *Yes. (shaky voice)*

Q: *Can you tell us where his hand was touching you?*

A: *My vagina, um, (starts crying) he didn't quite manage to – it – when he with his hands manage to, um, go anywhere inside my vagina but, um, and then he managed to roll me over.*

Q: *If you can stop, stop there um and I'm – I know this is difficult but –*

A: *Yep.*

Q: *– we need to know in as much detail as possible. (complainant sniffing) Can you be as precise as possible and tell us where he was touching you on your vagina? You know that there are outside parts to a woman's anatomy and there are inside parts. Can you tell us with as much detail as you can where his hand or his fingers were?*

A: *Yep. (pause) Um, I'm not very good with the anatomy, um, but – (shaky voice, breathing out)*

Q: *Well just in a way that you can – you feel comfortable telling us?*

JUDGE: *Well why don't you just tell us what happened? You've told us that – you'd told him to fuck off and that he got rougher with you and held you more firmly and rolled you over. You said that he then – he'd got his hands down your pants and he touched your vagina. Tell us what happened. What did he do?*



- A: *(pause) Um, (long pause, breathing heavily) when you mean, what did he do?*
- Q: *Well what part of his hand was he touching you with?*
- A: *His fingers.*
- Q: *And what did his fingers do?*
- A: *Tried to pleasure me but didn't succeed. (sniff)*
- Q: *Right. So, what was he doing with his fingers?*
- A: *Um –*
- Q: *Finger or fingers?*
- A: *Fingers, he was touching my – trying, yeah, touching my vagina and attempt – attempting to poke me is well, get me in the mood so I would sleep with him. (wet sniffs, long silence)*
- CROWN: *So, whereabouts on your genitals was he touching you?*
- A: *The front ha – I d – I don't wanna say something in case I get the name wrong.*
- JUDGE: *Well you use the words that you would use to describe the parts, don't worry about the technical terms*
- A: *(wet sniff, crying, tissues sound) Sorry.*
- Q: *All right, would you like a break? All right.*

As this instance demonstrates, some complainants were familiar with and able to use the term “vagina”, but needed other words in order to differentiate the parts of the genitals being described and the nature of the contact with them. The use of the term clitoris was noticeably absent from the transcripts of complainant evidence – in fact it is used in only one case across the 40 cases of both studies. Yet, as in the example above, the apparent unwillingness of counsel to use it and invite its use potentially led to inaccurate or incomplete evidence before the jury. This young woman becomes quite distressed as it becomes evident that she is not able to answer the questions being put to her because she does not have adequate language to do so. The judge and the prosecutor try to assist her by being patient and kind, but arguably during the giving of evidence in chief is too late to seek to avoid this embarrassing and distracting exchange.

In other instances, prosecutors were less kind and seemed to display impatience with complainants who were too uncomfortable or under resourced to offer descriptions that reflected the elements of the charged offence:

- Q: *When you were in the hands and knees positions on the bed, what happened?*
- A: *What happened, that's when he started having sex with me.*
- Q: *All right, what was he doing?*
- A: *Um, having sex.*
- Q: *Yep, but what sort of sex was he having?*

- A: *Like, I've gotta get – oh, I was on my hands and knees my head was down to the pillow.*
- Q: *But what was he –*
- A: *And he was behind me.*
- Q: *Yeah, it's important that we understand exactly what you are telling us and in order to understand we need you to explain, all right? (patronising tone)*
- A: *Yeah.*
- Q: *So, in the hands and knees position, what was it that [defendant's name] was actually doing to you, can you explain?*
- A: *He was rooting me from behind.*
- Q: *And what do you mean by that, what part of him was touching what part of you?*
- A: *From down the bottom.*
- Q: *Yeah, so you know the names for parts of your body?*
- A: *Um, vagina.*
- Q: *Yeah, so what was happening with your vagina?*
- A: *He had his (pause) cock inside there.*

These extracts demonstrate the gap that exists between the level and type of detail that counsel need to elicit for the purposes of evidence and the type of description that would sufficiently communicate the events in almost any other setting. Most complainants have never given evidence of this nature before and cannot be expected to know or perceive what is required in a criminal trial without guidance. We did not observe any particular differences in this regard between the trials in the principal or pilot study.

Together, the requirement for open questions, the level of detail necessary and some complainants' lack of familiarity with a range of terms for describing female genitals created difficulty with a key aspect of the prosecution evidence. In our view, the increased use of section 9 agreed statements of fact to cover matters not at issue at trial – such as the nature and type of penetration in cases in which consent is the issue at trial – could reduce the need for complainants to give this type of detailed evidence at trial.<sup>56</sup>

However, there will continue to be instances in which a complainant is required to describe the sexual acts involved, including the naming of genitalia and body parts. One way to support complainants to have the necessary language and confidence to answer such questions may be through increased preparation for giving evidence. This could involve

56 Section 9 of the Evidence Act 2006 allows the admission of certain facts by agreement and without need for evidence to prove the existence of the facts – see Appendix Two.

the prosecutor at an early meeting explaining to the complainant the level of detail of the sexual activity that she will be asked to describe and checking with her that she feels able to do so. If more assistance is indicated, this could be achieved through a community court preparation service provider. Care will need to be taken not to suggest terms or description to the complainant, but an independent specialist with counselling skills should be able to help a complainant to think about how she might express her account in response to the types of questions that are likely to be asked. Ideally, court preparation of this type would be available to all adult complainants of sexual offending; however, until adequate levels of service provision are available, responsibility for ensuring complainants are adequately prepared for standard questioning falls to the prosecution.

Alternatively, or possibly additionally, agreement or visual aids might assist complainants to navigate this challenging aspect of giving evidence. The use of a section 9 agreement could provide an opportunity for prosecution and defence counsel to agree as to the appropriate terminology in the particular case. This could then be known to all trial participants in advance of trial, and to the jury at trial. The complainant may still need to answer questions about the context and circumstances in which penetration occurred, but this at least might address what appeared to be the most consistently difficult aspect of describing the acts and body parts themselves.

Another possibility may be the use of diagrams, which are currently used in interviews with child complainants of sexual abuse. A diagram could assist complainants, for example with trying to describe points of contact within the area of her vulva, but outside of the vagina. Diagrams of genitalia can be generic and objectifying, so some complainants may not be comfortable with this option. The opportunity to see and discuss the use of such a diagram and ensure complainant consent could occur in pre-trial preparation processes. For some complainants, a diagram may assist them to more easily navigate a high point of tension during evidence in chief. We recommend that consultation on these options is undertaken with the input of relevant parties, including victim advocates. Guidance on this point could then be included in the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*.

### Viewing and responding to exhibits

Viewing and responding to questions about exhibits were other practical aspects of giving evidence that repeatedly caused difficulty for complainants. They did so in two particular ways; emotional difficulty in response to seeing the content of an exhibit and in relation to their form and use. Photographs of the scene triggered high levels of distress in some complainants, particularly if the photograph was of a place that the complainant had not been back to, or of a piece of clothing that the complainant had not seen since the incident. Sometimes photographs were of injuries sustained by the complainant and these also caused upset. This example is from the examination-in-chief in *Jackson*:

Q: *I'm going to pause you there because I just want to take you to the room now if I could.*

A: *Yeah.*

Q: *He's taking you through into the room, if you look at photograph [number] which is on page [number] of your booklet, you can see there the entrance to the room. Yasmin if you look at photograph [number] there's a photograph inside the bedroom and just take your time. Do you recognise that as being the bedroom that Simon put you on the bed?*

A: *(no audible answer) (starts crying)*

Q: *Do you recognise that as being the bedroom that Simon put you on the bed?*

A: *Yes. (crying)*

In the case of *Moss*, the complainant, Vivienne, and the defendant were neighbours and the rape occurred in her house after the defendant gained access. Vivienne left the house that day and had not returned to it since. At trial, the clothing worn by Vivienne on the evening preceding the rape was in dispute and she was shown photographs of her bedroom, including the clothing on and around the bed where the alleged rape occurred. This caused her to become very distressed, to the point of hyperventilating. In these two cases, and in several others, part of the distress seemed to be caused because the complainants were unprepared to be confronted with such material. Text messages or social media posts from soon after the incident also tended to cause distress. Sometimes these contained disclosures about what had happened or requests for help to friends or family members. In other cases, there were communications from the defendant before or after the incident that provoked strong emotional responses. Again, some complainants seemed surprised by this material and the shock of unexpectedly seeing them in court tended to prompt high levels of emotionality.

The practicalities of being questioned with reference to some exhibits also caused problems. Text message schedules, in particular, seemed difficult to follow for both complainants and counsel. The number of columns to be navigated, the range of colours used, the representation of numeric data and, in some cases, the sheer volume of messages necessitated detailed instructions to assist complainants to locate the texts that they were being asked about, and often caused confusion and delay. Text message schedules were entered as exhibits in most cases, so we suggest that some form of pre-court preparation for complainants should occur.

Transcripts of police interviews also caused problems including requirements of English language literacy that some complainants did not have.<sup>57</sup> In at least two cases – one in each of the principal and pilot studies – it appeared that the complainant had not seen the transcript before trial and therefore was confused when asked to comment on details in it.

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57 See below at 98.

As a consequence of researcher feedback on the draft,<sup>58</sup> the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* recommend that the prosecutor show the complainant, at a pre-trial meeting, exhibits she may be questioned about at trial – particularly if the exhibits contain sensitive material or could potentially confuse her.<sup>59</sup> The intention is that complainant familiarity with the exhibits at trial will assist them to be more confident when answering questions about them, as well as being emotionally prepared to see them in court. This initiative is welcomed in light of the evidence in these studies. We would add that adequate opportunity for complainants to emotionally process the experience of seeing the content of exhibits for the first time be included in the reasons for the *Guidelines*, so that this is drawn to the attention of the prosecution. Psycho-social court preparation service providers are probably best positioned to provide appropriate emotional support for complainants in relation to the viewing of exhibits. Such services need to be widely available and accessible, and complainants would benefit from co-operation and clarity of roles between Crown prosecution, CVAs and community support services, particularly in relation to issues such as questioning about exhibits during testimony.

### Being responsive to different communication needs and styles of communication

A number of difficulties arose related to unfamiliar language (other than difficulties related to genitalia) during questioning of the complainants. In some instances, these occurred when counsel used vocabulary with some complexity where simpler forms would have been preferable. In some cases, complainants had to ask for clarification of the meaning of words or appeared to misunderstand a question. One complainant was asked if she *reciprocated* the defendant's attraction to her rather than asked if she found him attractive too. Outmoded terms also caused confusion, for instance, "courting" rather than "dating" and "brassiere" rather than "bra".<sup>60</sup> Other examples related to the legal use of words that counsel took for granted but had different meanings for complainants, for instance:

**Q:** *When you think back carefully to all of the things that happen in that room, can you remember any other sort of contact or –*

**A:** *Oh, my contact, about my phone?*

**Q:** *No sorry, I'm talking about what was happening in the room physically between the two of you, okay ...*

58 Letter from Professor Elisabeth McDonald to Brendan Horsley (Deputy Solicitor-General) providing peer review of the draft *Guidelines for Prosecuting Sexual Violence* (25 January 2019).

59 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.14.4] and [7.14.5].

60 See further Chapter Eight at [370](#).

There were also examples of what appeared to be cross-cultural communication problems. For example, the complainant in the case of *Ahmed* answered a number of questions in cross-examination by saying “I don’t think so”. The recurrence of the phrase was frequent enough for Crown counsel to ask the complainant to clarify what she meant by the phrase in re-examination:

*Q: Now, Ms Anae, to a couple of the questions that [defence counsel] asked you, and I’ll just remind you of them, when he was talking to you about enjoying having sex with Mr Ahmed, and he was talking about the fact that you wanted to suck his penis and that you wanted a relationship, you were answering using the words, “I don’t think so,” okay?*

*A: Yep.*

*Q: Can you explain to us what that means? What does, “I don’t think so,” mean in the context –*

*A: I mean, I don’t think so, that means, no.*

This style of qualified, rather than direct, disagreement is similar to the phenomenon of gratuitous concurrence where people in relatively powerless situations avoid disagreeing with people in authority.<sup>61</sup> Gratuitous concurrence is most strongly associated with indigenous peoples and people from ethno-cultural groups in which there are strong imperatives to defer to people in authority.<sup>62</sup> Given that women from these groups are victims of sexual offending, and that counsel in criminal proceedings may be of European descent, cross-cultural miscommunications are likely to go unidentified during questioning (including investigative interviewing). We consider that these communication difficulties might be better identified and managed if prosecutors were more familiar with individual complainants before trial through increased trial preparation, and we recommend that training in plain language questioning and cross-cultural communication be provided to counsel and judges.

Currently, witnesses are entitled to communication assistance when giving evidence if they are not sufficiently proficient in English or if they have a communication disability.<sup>63</sup> That

61 “Gratuitous concurrence is when a person appears to assent to every proposition put to them even when they do not agree. For many indigenous people, gratuitous concurrence is a cultural phenomenon, and may indicate respect towards a person, cooperation between people, or acceptance of a particular situation. However, it is widely recognised that people who are in a position of powerlessness when confronted by alien institutions and authority figures, and who are disadvantaged due to a language barrier, may adopt a strategy of always agreeing or saying what they think the person in authority wants them to say, regardless of the truth of the matter.” Legal Services Commission of Australasia “How to assist an Aboriginal defendant” <https://lsc.sa.gov.au/dsh/ch03s04.php>

62 Satomi Hamon, Patricia Easteal and Trevor Ryan “An Intersectional Critique of Protections for Indigenous Rape Victims in Court” (2018) 19 Southern Cross University Law Review 3 at 11–12.

63 Section 80 (3) of the Evidence Act 2006 and the definition of “communication assistance” in section 4 of the Evidence Act, which will be amended if clause 4 of the Sexual Violence Amendment Bill 2019 is enacted.

entitlement is, however, subject to a judge's consideration that the witness is unable to understand questions sufficiently and to respond to them adequately.<sup>64</sup> The most common form of communication assistance utilised for witnesses is interpretation of a language at trial.<sup>65</sup> One complainant in the principal research and one complainant in the Pilot had English language interpreters.

In the principal study case *Perez*, which included interpretation, the complainant gave evidence for 539 minutes – one minute less than nine hours. The average time for giving evidence in the principal study was 241 minutes and questioning in this case took two hours more than that of any other trial.<sup>66</sup> The judge in *Perez* actively managed the fatigue this extended period of questioning caused for both the complainant and the interpreter by, for example, instituting additional adjournments to ensure that a short break occurred each hour. In the Pilot case of *Junn*, the complainant gave evidence for 488 minutes (8 hours and 8 minutes). The average time giving evidence in the pilot study was 227 minutes and questioning in *Junn* was 190 minutes longer than any other Pilot case. As would be expected, language translation of oral evidence considerably lengthens the time taken to give evidence.

In both of these cases the interpreter was female. The case materials in these trials did not disclose whether this was requested by the complainant; however, both women were from ethno-cultural backgrounds in which there are cultural taboos regarding women discussing sexual matters with unknown men. The gender of interpreters in sexual offending trials may impact on complainant comfort and, consequently, on the quality of evidence. An important aspect of complainant care in relation to the use of communication assistance is sensitivity to the cultural needs of particular complainants. Exploring the implications of these needs at the earliest opportunity – especially given the acknowledged shortage of experienced communication assistants – is consistent with guidance in the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*.<sup>67</sup>

There was no evidence of communication assistance to complainants other than translation in this research.<sup>68</sup> However, within the cases in the principal research, there were instances in which access to communication assistance might have helped the complainant to give

64 Section 81 (2) of the Evidence Act 2006.

65 Andrea Ewing "Communication Assistance: Update" in *Criminal Law Symposium* (NZLS CLE Ltd, Wellington, 2018) at 105; *Bae v R* [2012] NZCA 455 at [22].

66 One other case, *Jacobs*, was longer in terms of time in the courtroom because it included an EVI of 341 minutes out of a total of 542 minutes.

67 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [10].

68 We did not have access to information about communication with, or assistance to, complainants outside of the trial itself. It is, therefore, possible that communication assistance or court preparation was provided to some complainants. We refer here to what we were able to observe from the audio recordings and transcripts of the complainants' evidence and pre-trial decisions.

her best evidence. The prosecution closing in one case indicated that the complainant had limited intellectual capacity, which may have affected her understanding of consent, but there was no evidence of any inquiry into whether she needed communication assistance to give evidence. In another case, the prosecutor referred to the complainant as “simple” and “naïve” and suggested that this bolstered her credibility as a witness, and the judge referred in the summing-up to evidence about her “limited intellect”. In another case, the complainant was cross-examined on an alleged inconsistency between her statement to the police and her evidence in court and was referred to the transcript of her police interview. When asked to read an excerpt it became apparent that her level of literacy meant she was unable to do so:

**Q:** *Can you turn to page [ ] and you might want to back track to the last paragraph of page [ ], so you could start with the last paragraph of page [ ] and read the whole of page [ ]?*

**A:** *(pause) I think I’ve the worst English possible, I can’t even read it.*

**JUDGE:** *Well just take your time.*

Unfortunately, neither the judge nor counsel seemed to listen to or understand what the complainant had told them and she was required to indicate which version of her evidence on this point was accurate. In doing so, she had to concede that her evidence in court was wrong. Challenges on inconsistency between statements are frequent in cross-examination of complainants in sexual violation trials and require an ability to read the transcripts of statements made to the police. Therefore, complainants’ ability to read written English to the level required to understand a transcript needs to be determined as part of pre-trial preparation for court.

In the case of *Langley*, there appeared to be a number of linguistic miscommunications that were relied on by defence counsel to undermine the complainant’s credibility. In that case, the complainant, Mei, spoke English as an acquired language. She did not have an interpreter at trial nor, apparently, when she made her complaint to the police. During cross-examination she was challenged about her use of the word “story” in reference to her account to the police. Defence counsel inferred that the use of the word “story” reflected the fabricated nature of her account rather than her limited English language vocabulary.

Mei also struggled to convey her physical response to her experience of unwanted intercourse. In her police interview she had described her body as becoming tight and reacting unusually, and said that she was not sure if that meant she had “cumed” or not. Defence counsel put to her that this was an acknowledgement that she had enjoyed and consented to the sex. While Mei denied this proposition, she was unable to explain to the jury the apparent contradiction between her denial and her previous statement. It was not until the last question was put to her in re-examination that she was able to convey that her use of



the word “cumed” in this context reflected a misunderstanding of English language slang.<sup>69</sup> Crucially, a further miscommunication occurred in relation to her evidence of non-consent, in which she said that the situation would have been different if the defendant had asked her to have sex. From this, defence counsel inferred that she had fabricated the rape complaint. In re-examination she tried to explain:

**A:** *Because he was all quiet and he did it in a force, well he forcefully slept with me, I didn't see it coming before, but if he had asked me, it would have been a different case.*

In our reading of the transcript, Mei is trying here to convey that the lack of asking is indicative of the non-consensual nature of the sex, but it is difficult to assess how the jury would have understood this statement. These two examples from the principal study transcripts suggest that communication assistance might have assisted the complainants to give their evidence. However, it is not clear whether they would have met the current statutory threshold of possessing either insufficient English language proficiency to answer questions or a communication disability.<sup>70</sup>

Miscommunication and difficulties with language were less evident generally – although not entirely absent – in the pilot study cases. One complainant in the pilot study had an interpreter, but there was no evidence of communication assistance provided to any of the other complainants. The study materials did not disclose whether extra court preparation was provided to complainants in the particular Pilot cases. However, the increased level of support for those complainants generally and the existence of a community court support programme in Auckland might have contributed to more preparedness for court for some of the pilot study complainants.<sup>71</sup> Judges in the Pilot have had specialised training in managing sexual violence cases, including plain language questioning and how complainants experience the questioning process, and Crown counsel have been operating under protocols similar to the *Sexual Violence Court Pilot: Guidelines for Best Practice*. Together, these factors might have gone some way to reducing communication difficulties in the pilot study cases.<sup>72</sup>

69 See also Chapter Eight at 374.

70 See however the proposed amendment of the definition of “communication assistance” in clause 4 of the Sexual Violence Legislation Bill 2019, to include the provision to a person to facilitate communication who requires assistance to give evidence “for any reason”.

71 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 46, noting “HELP Auckland provided victim advocacy services in half of the cases observed by Sexual Violence Victim Advisors [in the Auckland District Court Pilot]”. From this it is not possible to be certain whether the complainants in the pilot study cases may have received that service, but it is consistent with the higher level of service in Auckland than in other parts of the country.

72 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 14. Note also Crown Law Solicitor-General’s *Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [10.3].

### *Use of alternative ways of giving evidence in adult rape cases*

Section 103 of the Evidence Act 2006 provides that an application can be made to a judge for directions that a witness be permitted to use an alternative way of giving evidence, other than orally (“the ordinary way”) in the courtroom.<sup>73</sup> Alternative ways include being in the courtroom but screened so as not to be able to see the defendant; by video link from another place, including by CCTV; or by a video recording made before the hearing under specified conditions.<sup>74</sup> This latter means of giving evidence usually refers to the playing of the video recording of the complainant’s statement to the police, or EVI, as part of her evidence in chief. In cases where the EVI is played as part of her evidence in chief, the complainant will still need to answer further questions during the trial, which may happen with the use of another alternative means – such as a screen or via CCTV.

Prosecutors are required to consider whether it would be appropriate for a complainant of sexual violence to give her evidence in an alternative way.<sup>75</sup> In doing so, prosecutors are expected to tell the complainant what alternatives are available and to ascertain their views.<sup>76</sup> Adult rape complainants have not been entitled to either make use of, or be consulted about, alternative ways of giving evidence, and this has been the subject of criticism and a number of recommendations for reform.<sup>77</sup> Following an announcement in July 2019, the Government has introduced legislation supporting best practice of adult complainants being consulted about the ways in which they wish to give their evidence.<sup>78</sup> The Sexual Violence Legislation Bill 2019 also extends the available alternative ways to include the pre-recording and

73 Section 83 of the Evidence Act 2006.

74 Section 105 of the Evidence Act 2006. A judge also has the power to make such directions on his or her own initiative. *Section 106* sets out the processes and conditions covering the use of video record evidence as an alternative way of giving evidence. See further Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV103.1] ff, [EV105.1] ff and [EV106.1] ff.

75 Crown Law Victims of Crime – Guidance for Prosecutors (6 December 2014) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [23]–[25]; Crown Law Solicitor-General’s Guidelines for Prosecuting Sexual Violence (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [9.2]–[9.3].

76 Crown Law Victims of Crime – Guidance for Prosecutors (6 December 2014) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [24]; Crown Law Solicitor-General’s Guidelines for Prosecuting Sexual Violence (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [9.2].

77 See Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating the Views of Te Ohaakii o Hine – National Network for Ending Sexual Violence Together* (Ministry of Justice, Wellington, 2009); Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011); New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [4.33]–[4.55].

78 *Proactive Release – Improving the justice response to victims of sexual violence* at [32] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf> Clause 24 of the Sexual Violence Legislation Bill 2019, if passed, will amend the Victims’ Rights Act 2002 to require the prosecutor to “make all reasonable efforts to ensure that the victim is informed about the ways in which the victim may give evidence”.

playing at trial of all of the complainants' evidence, including cross-examination.<sup>79</sup> Together these initiatives are likely – indeed intended – to increase the use of alternative ways of giving evidence in sexual violence trials.<sup>80</sup>

### Complainants' use of alternative ways of giving evidence in this research

A high proportion of complainants used an alternative mode of giving evidence in these studies – 70% in the principal study and 100% in the pilot study.<sup>81</sup> These figures demonstrate a significant shift in practice from that reported in 2009 in which only one of the 11 research participants (9%) who gave evidence at trial used an alternative means.<sup>82</sup> However, in the cases in the principal study there was more use of a screen as the only alternative measure, and a low rate of use of CCTV technology, which may be related to the lack of technology and facilities available in the courthouse at that time.<sup>83</sup> The lower proportion of cases in which the EVI was used in the principal study may be explained by these offences being committed earlier in time than those in the Pilot. Nine of the 10 alleged rapes in the pilot study were reported to the police between 2016 and 2018, however EVIs were only played at trial in half of the Pilot cases. Within the two studies (40 cases), the EVI was used in only 14 (35%) of the trials. This proportion seems surprisingly low given the high level of investment in them made by police and the evidence that they both minimise stress to complainants and ensure good quality evidence in court.<sup>84</sup> For this reason, we considered the advantages and challenges of their use in the adult rape trials studied.

79 Clause 14.

80 *Proactive Release – Improving the justice response to victims of sexual violence* at [23] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>; New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [4.33]–[4.80].

81 See Chapter Two at 33.

82 Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 95. Though, note their acknowledgement (at 2) that the small sample size means the results should be interpreted with caution.

83 The use of a screen is the simplest and most cost-effective alternative mode and allows the jury to see a complainant in person while they are giving evidence. Some complainants appreciate being able to be seen in-person by the jury and judge while not having to see the defendant while giving their evidence. Others have reported experiencing being in the same room as the defendant distressing, regardless of whether they could see him. See Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 73–77; Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 100–101. CCTV nearly eliminates the chance of seeing the defendant. It has the additional advantage of reducing distractions, so that the focus is on the person asking questions.

84 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [4.46]–[4.55].

### Seeking directions on use of alternative ways

In the principal study an application for judicial directions as to the use of an alternative way of giving evidence was made in 24 of the cases.<sup>85</sup> In most of those cases, the application was unopposed by defence counsel and granted by consent.<sup>86</sup> In four cases, the application was opposed by the defendant, but the judge granted the use of an alternative mode. In two of those cases, permission was given for use of a screen. In another case permission was granted to play the EVI and for the use of a screen. In the other case permission was granted to play the EVI and for the complainant to appear by way of an audio-visual link from a remote location.

In the case of *Depak*, an application was made for use of CCTV, but the use of a screen was granted instead, apparently because the courtroom did not have the appropriate facilities for CCTV to be used. Therefore, in at least one case in the principal study a complainant was unable to access the mode of giving evidence that she preferred due to a lack of adequate facilities.

Judges who granted applications for the use of a screen, which were opposed by the defendant, did so on a number of grounds: giving evidence in sexual violation trials is inherently stressful and screens can reduce stress; screens cause minimal intrusion in the courtroom; and screens do not cause injustice or prejudice to the defendant.<sup>87</sup>

In two cases, the applications for use of an alternative means of giving evidence were declined. In *Yamada*, an application to play the EVI was declined on the grounds that the application had not demonstrated that the complainant was suffering from trauma or was fearful of the defendant. The prosecution argued that the nature of the proceedings and the evidence to be given would inevitably give rise to stress and possible trauma for the complainant; however, the affidavit from the complainant referred only to her concern about her ability to recall the details of the event. The complainant also indicated that she was willing to give evidence in the ordinary way if the application was declined. On this basis, the judge held that there was nothing to suggest that a direction for use of the EVI was required and that fairness in the proceedings meant that the application should be declined.

85 See the grounds as listed in section 103(3), and the mandatory considerations in section 103(4). See further Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV103.1] ff.

86 Sixteen of the 24 applications are known to have been granted unopposed and by consent. Four were granted despite being opposed. In two cases opposed applications were declined. In the remaining two cases, there was insufficient information on the file to determine whether the application was opposed or not.

87 The grounds of opposition raised were that: the application lacked expert evidence as to the complainant suffering from trauma; giving evidence in sexual violation trials is by nature stressful so an alternative mode is unnecessary; and the defendant will suffer prejudice from the negative perception of him inevitably formed by the jury.

In the case of *Carter* the complainant, Teresa, had initially indicated a preference for giving evidence in the ordinary way but became anxious about giving evidence in front of the defendant as a result of her court education visit. Her statement in support of her application said:

*This has been a very traumatic experience and I do not want the defendant staring at me while I give evidence. I want to give my evidence efficiently and effectively and the thought of seeing him terrifies me.*

The defence opposed the application in *Carter* on two grounds. Firstly, that there was no expert evidence supporting the complainant's claim of trauma. Secondly, that the claim was inconsistent with evidence that Teresa and the defendant had had some text message contact after the events in question. In this case, the judge held that there was insufficient evidence to suggest that the complainant would suffer stress or anxiety in excess of what any complainant in a similar situation would by giving evidence in the ordinary way. The judge was of the view that it was also inevitable that the defendant would suffer some prejudice from the use of a screen by the complainant. The judge held that fairness therefore required that the application should be declined.

The prosecution in *Carter*, as in *Yamada*, had indicated in their submission that the complainant would rather proceed without a screen than have the trial delayed and rescheduled while evidence supporting her claim of trauma was gathered.<sup>88</sup> In another case in which an application for a screen was granted, the trial had already been delayed and rescheduled so that supporting expert evidence could be attained. The tension that arises between the time taken to gather expert evidence of potential traumatic impact and the avoidance of delay to the commencement of trial has also been noted in other recent research.<sup>89</sup> In our view, complainants should not be under pressure to choose between an alternative way and the avoidance of delay. Earlier court preparation and pre-trial prosecutor meetings with complainants, as provided for under the recent *Solicitor-General's Guidelines for Prosecuting Sexual Violence*, and the proposed amendment of the Victims' Rights Act 2002,<sup>90</sup> should assist in preventing such pressure from occurring in future trials.<sup>91</sup>

Rulings as to the directions on use of alternative means of giving evidence were not on the files in the pilot study cases, so an analysis of decisions, where the orders were not made by consent, was not possible.

88 The importance of early identification of need, based on sound processes, has been identified in other jurisdictions – see for example Mandy Burton, Roger Evans and Andrew Sanders “Implementing special measures for vulnerable and intimidated witnesses: the problem of identification” [2006] Criminal Law Review 229 at 235.

89 Rebecca Parkes “The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System” (DCLinPsy thesis, University of Auckland, 2017) at 72.

90 See above *n* 78.

91 Including, we suggest, attention to the links between communication assistance needs and the nature of the charges.

### Use of the Evidential Video Interview: advantages and challenges identified in this research

There are a number of potential benefits in utilising a video record of the investigative interview (EVI) as evidence in chief. For instance, if appropriate interviewing methods are used, the reliability and accuracy of the evidence is likely to be enhanced, particularly as in many cases the interview will have been conducted close to the time of the offending, before the memory of the witness fades. The use of a video record allows for editing of the EVI in advance of trial in order to comply with evidential rules,<sup>92</sup> and has the benefit of limiting the number of out of court statements made by the complainant, thereby limiting cross-examination on the basis of inconsistencies.

A further key objective of using EVIs at trial is to ensure that the complainant only has to give a full account of the events once (and not again at trial). This means it should reduce the number of questions that a complainant has to answer while giving evidence in chief.

However, there are challenges and potential evidential problems related to the use of EVIs as evidence in chief.<sup>93</sup> These arise primarily from the two different uses of the video – as an investigative tool for the police and as an evidential product at trial.<sup>94</sup> Contemporary investigative interviewing by police incorporates questioning techniques that enables the giving of evidence in “narrative form”, in which the witnesses provide their accounts of events rather than responding to prompting in a question and answer format. There is emerging evidence that this narrative style of interviewing is a better experience for complainants reporting sexual offending.<sup>95</sup> However, concerns have been raised about the

92 For further discussion of pre-trial recording of evidence see Elisabeth McDonald “Evidence Issues” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape In New Zealand* (Victoria University Press, Wellington, 2011) at 288.

93 For discussion of these issues in the England and Wales context, see Baroness Vivian Stern *The Stern Review: Independent Review Into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office, London, 2010) at 68–69.

94 See Elisabeth McDonald and Yvette Tinsley “Evidence Issues” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape In New Zealand* (Victoria University Press, Wellington, 2011) at 299–301; Yvette Tinsley and Elisabeth McDonald “Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges” (2011) 42 *Victoria University of Wellington Law Review* 705; Lesley McMillan and Michelle Thomas “Police interviews of rape victims: Tensions and contradictions” in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan Publishing, Devon, 2009) at 255.

95 Becky Hamlyn and others *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research, Development and Statistics Directorate, 2004); Lesley McMillan and Michelle Thomas “Police interviews of rape victims: Tensions and contradictions” in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing, Devon, 2011) at 255; Ronald Fisher and Edward Geiselman “The cognitive interview method of conducting police interviews: Eliciting extensive information and promoting therapeutic jurisprudence” (2010) 33 *International Journal of Law and Psychiatry* 321.

length of such interviews and the degree to which the less structured format is more difficult for juror comprehension.<sup>96</sup>

Research suggests that for prosecutors there is a tension between the benefits of EVIs, such as reduced complainant re-traumatisation and the increased reliability and completeness of the evidence in EVIs which assists decision-making, and the reality that good quality evidence in chief is “coherent and concise”.<sup>97</sup> Playing an evidential interview as evidence in chief also means that the first time a complainant answers questions about the events in the courtroom could be in cross-examination. It can also mean that at the beginning of their period of giving evidence, complainants have to watch themselves giving a very detailed description of the event, often while displaying high levels of distress or emotion. This could be a disturbing experience for some complainants and may not be the best prelude to questioning that demands focus and stamina.<sup>98</sup>

EVIs were played in 10 of the 30 trials in the principal research and in four of the 10 trials in the Pilot cases. In each of the studies, the length of time that evidence in chief took when the EVI was, and was not, played was analysed.

In the principal study, the average amount of time evidence in chief took when an EVI was not played was 83 minutes (one hour 23 minutes). The shortest evidence in chief was 20 minutes. The longest was 198 minutes (three hours and 18 minutes). In comparison, when the EVI was played, the length of evidence in chief nearly doubled, at an average of 162 minutes (two hours and 42 minutes). In these cases, the range was from 90 minutes to 319 minutes (four hours and 59 minutes).

The videos themselves ranged in length from 62 minutes to 314 minutes (five and a quarter hours) with the average length being just over two hours. Therefore, in most cases in which an EVI was played (eight out of 10), further evidential questions were put to the complainant as well. These took an average of 48 minutes with a range of between eight and

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96 Nina Westera, Mark Kebbell and Becky Milne “Lost in the detail: Prosecutor’s perceptions of the utility of video recorded police interviews as rape complainant evidence” (2017) 50 *Australian and New Zealand Journal of Criminology* 252; Mohammed M Ali and others “Australian stakeholders’ views on improving investigative interviews with adult sexual assault complainants” (2019) 26 *Psychiatry, Psychology and Law* 724.

97 Nina Westera, Mark Kebbell and Becky Milne “Lost in the detail: Prosecutor’s perceptions of the utility of video recorded police interviews as rape complainant evidence” (2017) 50 *Australian and New Zealand Journal of Criminology* 252; Nina Westera, Mark Kebbell and Becky Milne “It is better but does it look better? Prosecutor perceptions of using rape complainant investigative interviews as evidence (2013) 19 *Psychology, Crime and Law* 595; Yvette Tinsley and Elisabeth McDonald “Use of Alternative Ways of Giving Evidence: Current proposals, issues and challenges” (2011) 42 *Victoria University Law Review* 705; Rachel Zajac and others “Investigative Interviews with Adult Sexual Assault Complainants: Challenges and future directions” in Jason Dickinson and others *Evidence-based Investigative Interviewing: Applying cognitive principles* (Routledge, New York, 2019) 177.

98 See for example Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims’ experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 56.

120 minutes. In two cases in the principal study, the additional questions by the prosecutor to the complainant took longer than the EVI itself. In one such instance the EVI was an hour and a half long and the additional questioning was two hours long.<sup>99</sup>

In the pilot study, the average amount of time evidence in chief took when an EVI was *not* played was 109 minutes (one hour 49 minutes). The shortest evidence in chief was 55 minutes and the longest was 175 minutes. In comparison, when the EVI was played, the evidence in chief aspect of giving evidence took on average 128 minutes (two hours and 8 minutes). The range was from 75 minutes to 250 minutes. The EVIs themselves ranged from 57 to 109 minutes with an average of 73 minutes. In the cases in which an EVI was played, additional questioning was 31 minutes or less in three of the four trials. However, there was one trial in which the EVI was one hour and 50 minutes long and additional questions took another two hours and 20 minutes.

Principal cases (n=30)	Average length	Shortest	Longest
EIC (not pre-recorded)	83	20	198
EVI	122	62	314
EVI and additional questions	162	90	319
Additional questions	48	8	120

Pilot cases (n=10)	Average length	Shortest	Longest
EIC (not pre-recorded)	109	55	175
EVI	73	57	109
EVI and additional questions	128	75	250
Additional questions	55 <sup>100</sup>	18	141

In the pilot study, the EVIs themselves were shorter – averaging 73 as opposed to 122 minutes. This would appear to reflect the recent investigative interviewing policy of aiming

<sup>99</sup> The case materials included in these studies did not include the transcript of the EVI. Therefore, we were not able to compare the content in the EVI with the oral evidence to determine if the same material was covered. However, the questions asked in evidence in chief in cases where the EVI was played appeared to largely follow the sequence and coverage of events that is usual in cases in which the EVI was not played.

<sup>100</sup> This average does not really reflect the spread of additional questions across the four cases, which was 18, 29, 31 and 141 minutes.



to reduce the length of EVIs where possible to one hour or less time.<sup>101</sup> This contributed to a shorter total time of evidence in chief in which an EVI was played in the cases in the pilot study as well – being 128 as opposed to 162 minutes. Nonetheless, within both studies the use of an EVI during evidence in chief **increased**, rather than reduced, the amount of time that evidence in chief took.

Although the complainant is not being questioned while the EVI is being played, the benefit of playing it as evidence in chief becomes less apparent in cases where the additional questioning is extensive. Cases in which additional questions took longer than the EVI itself are of particular concern. It is difficult to perceive the benefit to complainants of playing EVIs in these cases. The complainant will have had to both sit through watching herself give her statement in court and answer an extensive range of detailed questions about the events in question. Taken together with the low rate of use of the EVIs, the time used to elicit the additional evidence required to adequately inform the jury in several of the cases in which they were used suggests that prosecutors are finding that EVIs pose significant challenges for best putting the evidence before the jury.

Other difficulties with the use of EVIs were observable in these studies. The pattern of emotionality that was common to many complainants during evidence in chief was of beginning in a heightened state of anxiety. This tended to dissipate to a degree through the early passage of questioning on the logistic details of the events leading up to the alleged assault. As the complainants described the incidents, many became distressed, sobbing, showing verbal expressions of emotional difficulty and taking long pauses. As the questioning shifted to the events after the incidents, many complainants showed less distress and some emotional resolution. Giving evidence in a structured or chronological way in response to open-ended questions is distressing for complainants; however, it may also offer an opportunity to relate the events in question in a relatively empathic context and with a degree of emotional coherence before cross-examination commences.

In cases where EVIs were played and relatively few additional questions were asked, complainants were first required under cross-examination to describe the details of what happened. There seemed to be a higher level of distress in these cases. Often these inquiries followed questioning about the behaviour of the complainants in the lead-up to the incident in order to establish that the complainants had in fact been consenting or, at least, had suggested consent to the defendants. In some of these cases, as in others, cross-examination commenced with a direct challenge to the complainants' credibility or character. These types of questions tended to elicit either anger or resistance or distress or withdrawal from the complainants who were already experiencing heightened emotionality when asked questions about the incident.

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101 We understand from the workshop consultation on 30 August 2019, that police are currently trialling changes to the investigative interview format with the aim of reducing EVIs to one hour or less.

A further difficulty related to the EVI is the different approach to memory recall engendered by narrative interviewing compared to evidential questioning. Questioning at trial will proceed along a more lineal and chronological order, than in the interview, and a complainant will be asked to recall details that she originally gave in a more narrative and discursive form, which can lead to frustration or distress (as well as becoming a fertile area for cross-examination). This type of confusion was verbally expressed by a number of complainants in the principal study. For example:

**Q:** *So, tell us in your own words what happened next?*

**A:** *Sorry in the video that I did it wasn't in chronological order so I'm trying to bring, do that in order. I don't know in what stage he went back into [friend's] room. I don't know if that was now or after but yeah so, I don't know where to go – (inaudible) – sorry.*

This issue was pronounced in cases where complainants were being asked to recall a number of incidents that formed the basis of several charges, and in cases in which the events occurred over a number of days.

However, there are advantages in use of the EVI in court. Some complainants do prefer to give their evidence in chief this way.<sup>102</sup> There were cases in these studies in which complainants struggled to articulate their experiences or to effectively communicate within the question and answer format of examination in chief. This was particularly the situation for some of the youngest complainants and for those who had communication needs. Two prosecutors expressed regret during discussions in the absence of the jury that they had chosen not to use the EVI because they were struggling to lead the evidence in a coherent and concise form. Those complainants who were not asked many additional questions did not need to repeat their account of events in the courtroom, which may suit some complainants. The playing of the EVI also reduces the likelihood of being challenged about inconsistent statements during cross-examination. This may in turn reduce the length of cross-examination.

The pilot study demonstrated that other significant advantages can be achieved through altered evidential procedure. For instance, in the case of *Salah*, the EVI was stopped during playing and the complainant was excused from the courtroom for its duration. The judge determined that the level of distress that she was exhibiting was neither in her nor the

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<sup>102</sup> Becky Hamlyn and others *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research, Development and Statistics Directorate, 2004); Lesley McMillan and Michelle Thomas "Police interviews of rape victims: Tensions and contradictions" in Miranda Horvarth and Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing, Devon, 2011) at 255; Ronald Fisher and Edward Geiselman "The cognitive interview method of conducting police interviews: Eliciting extensive information and promoting therapeutic jurisprudence" (2010) 33 *International Journal of Law and Psychiatry* 321.

trial's best interests. The example demonstrates two matters. It confirms that for some complainants watching the EVI in the courtroom, even if they have seen it before, can cause considerable upset; and it suggests the possibility that complainants do not need to be present in court when the EVI is played.

In three other pilot study cases, the EVI was played to the jury in the absence of the complainant. Each complainant was given the opportunity to view the EVI before the trial. She was then able to attend court to give her oral evidence in a session after the jury had watched the EVI. This is a protocol that was introduced in Whāngārei for child and vulnerable witnesses and has been extended to adult complainants of sexual violence under the auspices of the Sexual Violence Court Pilot.<sup>103</sup>

Complainants have said that one of the worst aspects of the trial is feeling like an observer at a distance from one's own victimisation.<sup>104</sup> It is possible, then, that watching an EVI while being observed by others in the courtroom contributes to this experience. Therefore, this initiative, of playing an EVI in their absence from the courtroom, would appear to support the well-being of some complainants. However, we note that some other complainants may prefer to be present while other people are watching their EVIs. This option should be discussed with the individual complainant as part of pre-trial meetings with the prosecutor. In two of these Pilot cases, EVIs were played on the first day of trial and the complainants were the first witnesses to give evidence on the second day of trial. This practice significantly improves the ability to predict and manage the amount of time complainants wait before giving evidence on the day of trial. This is a recommended practice in the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*.<sup>105</sup>

### Directions to the jury on alternative ways of giving evidence

Section 123 of the Evidence Act 2006 sets out the requirement that in a criminal trial in which a witness gives evidence in an alternative way the judge must direct the jury that –

- (a) the law makes special provision for the manner in which evidence is to be given, or questions are to be asked, in certain circumstances; and
- (b) the jury must not draw any adverse inference against the defendant because of that manner of giving evidence or questioning.

103 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 10.

104 Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 93; Amanda Konrad, *Taking the Stand: Rape survivors and the prosecution of rapists* (Praeger, London, 2007) at ch 4. But see Mark R Kebbell, Caitriona M E O'Kelly and Elizabeth L Gilchrist, "Rape Victims' Experiences of Giving Evidence in English Courts: A Survey" (2007) 14 *Psychiatry, Psychology and Law* 111.

105 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) <https://www.crownlaw.govt.nz/publications/prosecution-guidelines/> at [11.5].

The purpose of the direction is to counteract any prejudice that might arise concerning the defendant as a result of the mode of evidence that the complainant uses. The risk is that jurors might think that the defendant is dangerous and needs to be kept separate from the complainant or, alternatively, that the court has allowed the means of giving evidence because the complainant's evidence is highly credible.

A direction under section 123 must include the matters listed above but the exact form and timing of the warning is not prescribed by the section. This means it may be given in advance of the evidence that is given by alternative means, or in the judge's summing-up to the jury at the end of the case, and possibly both. In the principal study, the direction was given to the jury during the judges' summings-up in 18 of the 21 trials in which the complainant used an alternative way of giving evidence. The directions were given in a range of terms, for instance some directions were succinct, as in *Ihaka*:

*[The complainant] gave her evidence in chief by video recording made when she was first interviewed about her complaint. She gave the rest of her evidence in Court screened from the defendant. Take into account the evidence she gave in Court when considering her video interview. As I explained earlier, this procedure is standard practice and I remind you not to let it affect your view of the complainant or the defendant or your assessment of the evidence.*

Some directions were much lengthier, as in *Jackson*:<sup>106</sup>

*Another general matter I want to just touch on again is that you will recall when the complainant gave her evidence the screen was erected between her and the accused so that he could see her but she could not see him. I just reiterate what I said to you about that at the time – the reason that is done and it is commonly done, what we call a mode of evidence order, is to make an emotional and disagreeable experience easier to get through for a young complainant. It is no reflection of any sort on the accused. It does not mean that he is someone from whom she needs to be guarded or protected or anything of that kind. It is a routine sort of a direction that is made in cases of this kind involving alleged sexual offending, particularly where the complainant is a youngish person but not always in that situation. Just to make it easier for the complainants, so do not take any inference against the accused on that account. There is nothing unusual about the fact that that order was made in this case.*

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106 We note that in *Pillidge v R* [2011] NZCA 194 at [25], the Court of Appeal said that it is helpful for a judge to explain the reasons for a screen, rather than relying on the bare direction in section 123, which will reduce the risk of jury speculation.

As is observable in the above examples, some directions were largely restricted to the matters set out in section 123. Others provided additional information such as explanations of the reasons for special provisions for complainants in sexual offending trials or of the kinds of negative inferences about the defendant that should not be drawn. Most directions made reference to reducing the stress or increasing the comfort of complainants when giving evidence in such cases.

As above in *Jackson* and below in *Walters*, some judges coupled this information with an explanation that alternative modes were standard or normal practice and therefore of no forensic significance:

*I want to speak briefly about the mode with which she gave her evidence. The DVD interview and the screens, and repeat my opening remarks to you that those cast no adverse reflection on the defendant at all. They are simply methods to try and minimise stress on complainants in cases of this kind. They are commonly used in the courts all over the country these days, and are simply a reflection that we live in the twenty-first century, and the important point is that it says nothing adverse about the defendant.*

In other instances, judges grouped directions on alternative ways of giving evidence with discussion of other accommodations made for complainants of sexual offending, such as clearing the courtroom, or for witnesses generally, such as the presence of a support person. In *Masters* the judge characterised all of these procedures as “techniques” and, thereby, conveyed that they were immaterial:

*Now I remind you of a direction that I gave you during the trial when the complainant gave evidence about the use of the screen, the closing of the Court and the presence of a support person for her. These are all techniques available in our law to make the process of giving evidence more comfortable, less stressful. These say nothing about the accused whatsoever. Under no circumstances must you hold against him in any way at all that these various techniques were used when she gave evidence.*

Many judges gave a direction both before the evidence and in summing-up.<sup>107</sup> There were three cases in which the direction was given *only* before the evidence was presented, and not as part of the judge’s summing-up. The judge in *Devi* spoke in the following terms:

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107 In some cases, the directions were on the audio recording immediately before the complainant came into the courtroom. However, it was apparent from other remarks or the judge’s summing-up that some judges included the alternative ways direction in their opening remarks. As we did not have access to those remarks, we were not able to determine how many did so.

*Mr Foreman, ladies and gentlemen of the jury, you will observe that the screen is there around the accused and I know that [name] for the Crown has already said to you, but I am bound also to tell you for the record, that the purpose of the screen is to enable the complainant in a room full of strangers to be able to give evidence in a manner that is the least inhibiting, if you like, hence the screens are there and the point is that you don't read anything adverse in respect of the accused because those screens are there. The law simply provides for that as a standard measure in such cases as this.*

In the pilot study cases, which all included the use of at least one alternative mode of evidence, nine of the 10 judges gave a direction in their summing-up to the jury and at least six judges gave directions both before and after the evidence. A similar pattern of variance in length and reasons given for the use of alternative ways, as for the principal study cases, was apparent in these cases.

We are not aware of any research that has investigated whether the precise form in which directions such as these are given influences how jurors make sense of the use of alternative ways of giving evidence. However, the considerable variance in practice and content within the cases in this research leads us to recommend additional guidance to judges on the reasons they might give in explanation of the use of alternative ways, and the extent of such directions. We also consider that the jury could be reminded about the ongoing nature of suppression orders in such cases – this was not referred to in any of the cases as part of the material we had access to.

### ***Impacts of the courtroom environment***

The audio records of complainant evidence also illuminated a range of ways that the courtroom environment impacted on the complainants' comfort and welfare while giving evidence. Some of the difficulties arose from failing technology or inadequate facilities. Other issues arose from the variable implementation of procedural accommodations that already exist for complainants of sexual violence. These issues include such things as the time waiting to be called to give evidence, avoiding of inadvertent contact with the defendant, clearing the court during the complainant's evidence and delay in cases getting to trial. We demonstrate how these factors impacted on complainants in these studies but note that a number of relevant change programmes or policy reviews are already under way.

### Waiting to be called to give evidence

Complainants have expressed dissatisfaction with the amount of time they can wait to give evidence on the day of trial. The courthouse environment is foreign to many witnesses and can be intimidating and uncomfortable.<sup>108</sup> Even complainants and their supporters who are able to access dedicated waiting spaces and have relatively easy access to CVAs find waiting times difficult, describing a sense of being “locked up” for the duration of their time at court.<sup>109</sup> Reduced waiting times remain a priority for complainants, even when witness facilities are improved.<sup>110</sup>

Court sittings officially begin at 10 am. The Crown present their evidence first and in sexual offence trials the complainant is usually the first witness to be called to give evidence. Historically, complainants have been scheduled to appear on the first day of the trial. They are required to be at court by 10 am and then wait to be called to give their evidence. Before the complainant can be called a number of procedures have to be completed. These include: the selection of jurors and a jury foreperson; resolution of any arising evidential issues; opening remarks from the judge and opening addresses – usually from both the prosecutor and defence counsel. These processes usually begin at 9 am. However, they can each take some time, and the cumulative amount of time taken is difficult to predict. This means that complainants do not know how long they will need to wait on the day in advance of giving evidence and some can wait much longer than others.

The time that the complainants were called to give evidence is known for all of the trials in these studies. In the principal study, three complainants were called before 11 am, 10 complainants were called between 11 am and 12 noon and 13 were called after 12 noon and before 1 pm. Therefore, 26 of the 30 complainants (87%) were called before the lunch adjournment at 1 pm on the first day of the trial. The other four complainants were called after lunch on the first day of trial – at 2.50 pm, 3.50 pm, 4.07 pm and 4.15 pm respectively. There was no information on these latter files to explain the longer waiting times. Complainants who are called late in the day are more likely to have to return the following day and spend two days at the court. Seventeen (57%) of the complainants in the principal study gave their evidence over two days. This included the four complainants who were called after the lunch adjournment.

108 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 72.

109 At 74.

110 *Proactive Release – Improving the justice response to victims of sexual violence* at [58] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf> and see clause 14 of the Sexual Violence Legislation Bill 2019.

Principal study (n=30)			
Between 10 & 11 am	Between 11 am & 12 pm	Between 12 & 1 pm	Between 2.15 & 5 pm
3 (10%)	10 (33%)	13 (44%)	4 (13%)

In the pilot study, five of the complainants gave their evidence in the courtroom, as opposed to via CCTV. The times at which they were called to give evidence are represented in the table below. Three complainants began their evidence before the lunch adjournment at 1 pm. Two complainants were called after lunch – at 1.50 pm and 2.10 pm respectively. One of these trials included an EVI as part of the complainant's evidence in chief and it was played while she was in the courtroom in the usual manner. Three of these five complainants gave their evidence over two days, and included both of the women called after lunch.

Pilot study – in the courtroom (n=5)			
Between 10 & 11 am	Between 11 am & 12 pm	Between 12 & 1 pm	Between 2.15 & 5 pm
0	1 (20%)	2 (40%)	2 (40%)

  

Pilot study – by CCTV (n=5)			
Between 10 & 11 am	Between 11 am & 12 pm	Between 12 & 1 pm	Between 2.15 & 5 pm
1 (20%)	2 (40%)	0	2 (40%)

The other five complainants in the pilot study gave their oral evidence by CCTV and the times at which they were called are set out above. Of note is that in two of the three cases in which the complainants were called before 12 noon, they gave evidence on the second day of trial. In these trials, the processes that need to occur before any witnesses can be called had taken place on the first day of trial, in the complainants' absence. The juries had also watched the complainants' EVIs on that first day of trial. In all three of the cases in which the complainants were called before 12 noon, they completed their evidence on the day that they were called. The two complainants who were called after the lunch adjournment – at 2 pm and 2.30 pm respectively – gave their oral evidence by CCTV on the first day of trial. Both of these women had to return the following day to complete their evidence.

The smaller number of trials in the pilot study, means that a direct comparison of complainant waiting times between the two studies cannot be made. However, taken together they demonstrate that most complainants waited one to three hours in the courthouse before giving evidence. Some complainants waited between four and six hours. Of particular concern is the number of women who had to attend court to give evidence over two days. Nineteen



complainants had to do so, and for most of these women, the overnight adjournment occurred during cross-examination. Witnesses are not allowed to discuss their evidence while they are giving evidence. This means that those complainants spent about 17 hours without being able to talk with anyone about the case and while awaiting more cross-examination.<sup>111</sup> We imagine that would be very stressful. Trial management practices that increase the likelihood that a complainant can give all her evidence in one day are to be welcomed.

As described above, in the Pilot, the increased use of CCTV, the prior playing of the EVI and the complainant's attendance at court on the second day of trial are innovative practices intended to assist complainant well-being. The evidence from this study suggests that these practices are also reducing complainant waiting times, as well as the number of days that a complainant needs to attend court. The latter practice is also recommended in the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*,<sup>112</sup> and we support an approach that provides more certainty for complainants, and reduces waiting times.

### People and movement in the courtroom during complainant evidence

Fear of seeing or encountering the defendant while at court is a source of anxiety for some complainants.<sup>113</sup> A particular point of tension occurs as the complainant and defendant enter and exit the courtroom.<sup>114</sup> Complainants have said that their sense of safety in the courtroom is increased when offender movement is well managed and judges are actively overseeing the practical aspects of the courtroom arrangements.<sup>115</sup> If a complainant has been granted permission to give evidence from behind a screen, then she has already indicated that she does not want to see the defendant while in the courtroom, so particular care is needed.

In most cases in these studies, judges did carefully manage the movement of the complainant and defendant in and out of, and around, the courtroom. This ensured that the complainant and defendant were not inadvertently visible to, and did not encounter, each other when entering or leaving the courtroom. The complainant in *Depak*, was granted the use of a screen. The following excerpt demonstrates how the judge organised the order of entry so that there was no possibility of inadvertent visibility as she moved into the witness box:

111 For further discussion see Elaine Craig "The Inhospitable Court" (2016) 66 University of Toronto Law Journal 197 at 237.

112 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [11.5].

113 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 72.

114 See also New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at [4.141] as to their recommendation that courtrooms be made more easily able to be purpose configured, particularly for complainant comfort.

115 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 73.

*JUDGE: Jury in please. Oh, just pause please. Sorry can you just stop the jury? Just stop the jury. Now what we need to do because we need to put a screen up is, we need the accused to just step outside please. Is that door shut? Door shut please. When we have screens, always with the jury out, then I want the witness brought in, curtains closed, position checked, then the accused comes in. Then the jury. We will do the reverse on the way out.*

In most cases in which judicially initiated management of complainant- and defendant-movement did not occur, the prosecutors requested that judges ask the defendants to leave the courtroom momentarily while the complainants exited or re-entered the room. This example is from the case of *Jacobs*:

*JUDGE: So, we will take that adjournment. Thank you, members of the jury. There is just one or two minor matters I want to discuss with counsel in chambers now so [court staff] please escort the jury and we will clear the Court at this point. If counsel could remain and if the accused could remain as well please.*

*CROWN: If [the defendant] could stand down for the moment while the complainant goes out?*

*JUDGE: That's fine. If you could stand down and then come back. Thank you.*

As previously described, there is a legislative requirement that the court be cleared of the public when complainants in cases of a sexual nature give evidence.<sup>116</sup> The necessary trial participants are present, and the media, anyone the complainant wants, and anyone the judge permits at their discretion may also be present. This has been the statutory requirement in Aotearoa New Zealand since 1986.

In one case in the principal study, the judge was asked by defence counsel, immediately prior to the complainant being called to give evidence, to exercise discretion on allowing a lawyer, who was not engaged in the proceedings, to observe the trial. The judge did allow the presence of the lawyer, requiring that she sat out of view from the complainant. In making the decision the judge did not consult with either the complainant or the prosecutor. Indeed, no discussion was had as to the reasons for the rule or the purpose of the lawyer observing the trial; permission was simply granted. The complainant was not informed of the decision before commencing her evidence. The lack of reference to the purpose for the rule or to the wishes of the complainant is of concern. We recommend that judicial development programmes include discussion of the purposes for the rule and of considerations that should be weighed before an exception is granted.

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116 *Section 199 of the Criminal Procedure Act 2011.*

### Improving courtroom equipment and facilities

The suitability and functionality of the courtroom can also impact on complainants in other ways. In many of the trials there were difficulties with the complainants being heard while giving evidence. Courtrooms are reasonably large rooms and the witness box is some distance from the jury, so witnesses need to speak loudly or project their voices in order to be heard clearly. There is a microphone at the front of the stand for recording the complainant's evidence for transcription. These microphones do not amplify the complainant's voice. In over a third of the trials in the principal study, the complainant was asked to speak up at least once. In some cases, requests to speak up occurred repeatedly. In one trial this happened 10 times. It was clear that for some complainants having to speak louder than they preferred was difficult and exacerbated the challenges of giving evidence.

Some judges spoke kindly to complainants when making "speak up" requests. For example, in the case of *Edwards*, in response to the registrar who advised the judge that the complainant's voice was not audible to the transcriber, the judge said:

*Now Ms Matiu you have got a very quiet wee voice and I know that this is probably a strange environment in here but we need you to speak up. Move toward the microphone please because everything you say is going to be typed up. Alright? Thank you.*

Some judges were clearly familiar with the problem and proactively explained the need for the microphone and ensured it was well placed before the complainant began her evidence. One such example was:

**JUDGE:** *Ms Taylor I know you won't be used to talking in a microphone but it just helps us here if we can all hear you.*

**A:** *Yup.*

**JUDGE:** *Everything you say is being digitally recorded and someone – somewhere in the country they are recording everything –*

**A:** *Ok.*

**JUDGE:** *And if you don't use a big voice, they won't be able to hear what you're saying. But also, it is really important that the people over there can hear what you are saying because that's the jury and they really need to hear what you're saying. Ok?*

However not all judges were proactive in addressing this courtroom problem nor demonstrated kindness in addressing it. In some cases, the instruction to "please speak up" or "you need to speak up" was delivered in an impatient or patronising tone. In other cases, the judicial intervention with "speak up" instructions occurred during particularly challenging questioning. At best, these instances of judicial communication cut across the flow of the complainants' evidence and seemed to disturb their recollection. At worst, they tended to have a chastising and quietening effect on complainants.

In the pilot study cases, lack of amplification was less problematic with “speak up” instructions occurring in only two of the 10 cases. This could be attributed in part to the increased use of CCTV, which enables volume adjustment. The increased use of CCTV as an alternative way of giving evidence and pre-trial recording of the whole of an adult complainant’s evidence are currently proposed changes to trial procedure for cases involving allegations of sexual violence.<sup>117</sup> This is likely to reduce, but not eliminate, the number of complainants who give evidence in person in front of a jury, so the problem of lack of amplification remains. Low volume and flat affect can be an effect of trauma or can arise from attempts to control emotionality or stay calm.<sup>118</sup> There may also be cultural reasons why complainants speak quietly in the courtroom.<sup>119</sup> We believe that complainants should be able to testify at whatever volume is preferable to them. It should not be necessary for judges to ask complainants to speak up while they are focussed on answering questions. We recommend that unless microphones which provide amplification are provided in the witness box, complainants should be fitted with a lapel microphone or provided with some other mechanism to assist amplification.

Poorly performing or inappropriate equipment also caused difficulty for complainants and affected the quality of their evidence. In the worst example, the audio recording of the complainant’s evidence stopped working and this went undetected for nearly half an hour during a very challenging part of her cross-examination. This caused serious distress for the complainant who was required to return the next day to repeat the evidence. In some courtrooms, the screen on which the complainant’s EVI was being shown appeared to be out of her view, so she had to move to a different part of the courtroom to watch it. In a case in the pilot study in which the complainant was in the CCTV room, the angle of the camera focussed on the prosecutor was askew, so the complainant was seeing the side of the prosecutor’s head. In another courtroom the CCTV could only receive one input source at a time and had to be physically re-plugged between the DVD playing and the complainant’s mode of evidence screen operating. In a High Court trial in which the complainant was very quietly spoken, a photocopier was used repeatedly during her evidence and its noise was loud enough to cause difficulties in hearing the audio recording.

The quality of the DVDs (on which the EVI was recorded for use at trial) caused significant disruption in three trials. In one trial, the DVD jumped. In another, the sound was not

117 Clause 14 of the Sexual Violence Legislation Bill 2019 and Recommendation 7.5 of Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in Aotearoa New Zealand* (Victoria University Press, Wellington, 2011).

118 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 32. Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 147.

119 See Satomi Hamon, Patricia Easteal and Trevor Ryan “An Intersectional Critique of Protections for Indigenous Rape Victims in Court” (2018) 19 Southern Cross University Law Review 3; Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 147.

synchronised with the visual recording. In the third trial, the sound was so low as to be inaudible in the courtroom. This meant that the jury had to read the transcript to follow the complainant's evidence as they watched the EVI. In another example, the DVD player in the courtroom did not work and had to be replaced. In each case, the complainant's evidence was delayed while technical assistance was sought. Judges were clearly frustrated with the poor quality of equipment available for the playing of EVIs. Judges in several cases referred to such problems occurring repeatedly. They seemed particularly concerned about the potential for these problems to compromise the quality of the evidence before the jury, as well as the consequential disruption to the trial.

These are all matters that are deserving of attention under the proposed amendment to the Victims' Rights Act 2002, requiring that "appropriate facilities are available to victims when attending court".<sup>120</sup>

### Time from reporting of event to commencement of trial

The option to pre-record all of the complainant's evidence for playing at trial in her absence is currently proposed.<sup>121</sup> One of the primary reasons for implementing this alternative way of giving evidence is that it will allow the complainant to give her evidence earlier, reducing the harm caused by delays in waiting for trial.<sup>122</sup> Presently, sexual offending cases are considered priority cases for timetabling in Aotearoa New Zealand's District Courts.<sup>123</sup> Nonetheless, trials are still said to take unnecessarily long to commence and to be frequently postponed during the timetabling process.<sup>124</sup> Complainants report that the latter situation causes considerable emotional distress including depression and anxiety,<sup>125</sup> and may be associated with victims withdrawing their complaints. The speedy disposition of trial is therefore an aspect of complainant care.

120 Clause 24.

121 Clause 14 of the Sexual Violence Amendment Bill 2019.

122 For example, impacts on recovery and the need to recall details in order to provide consistent evidence at trial: see New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, Wellington, 2015) at 7.

123 Chief District Court Judge Doogue *Rostering Protocol for District Courts of New Zealand* (Ministry of Justice, Wellington, 2014) at 4.

124 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 50; Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 61.

125 Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington, 2009) at 79; Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 50–54; Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DClinPsy thesis, University of Auckland, 2017) at 62.

Information about the interval between making a report to the police and the commencement of trial was available for 29 of the 30 cases in the principal study. The shortest interval was eight months and the longest was 37 months (three years and one month).<sup>126</sup> The median time interval was 17 months.

Principal study (n=30)				
Less than one year	Between 12 and 18 months	Between 18 and 24 months	More than two years	Total known
6 (21%)	10 (34%)	8 (28%)	5 (17%)	29

Concerns about the impact of delay on complainants is one of the factors that the Sexual Violence Pilot Court has sought to ameliorate in the hope of reducing complainant dissatisfaction with the criminal justice process. In the Pilot cases in this study, the interval between making a report to police and the commencement of trial ranged between eight and 54 months (four years and six months), with the median being 13 months. The two trials over 18 months must have entered the Pilot after delay outside the Pilot track, so these are likely to be unrepresentative of progress in the Pilot itself.

Pilot study (n=10)				
Less than one year	Between 12 and 18 months	Between 18 and 24 months	More than two years	Total known
3 (30%)	5 (50%)	1 (10%)	1 (10%)	10

These figures suggest that the Pilot has successfully reduced the interval between reporting and trial commencement through changed case management and scheduling practices. If this pattern of half of the Pilot cases being heard in just over one year and 80% within 18 months can be sustained, or reduced further, complainant dissatisfaction with time to trial could be significantly reduced. We note, though, that assessing the benefit of reduced time to trial should prioritise complainant experience. Adequate time for emotional processing and trial preparation is also a consideration in complainant well-being. Complainants should not come under pressure to be ready for the trial process in the interests of institutional performance measurements. As times to trial are shortened, and if fuller pre-trial preparation becomes more widespread, research as to optimal timing and benefit would be useful.

<sup>126</sup> Time was measured as less than x months – that is if the time was between seven and eight months this is recorded as less than eight months.

### *Summary and some proposals*

This chapter made use of the audio recordings of complainant evidence to examine how some of the relational and circumstantial aspects of giving evidence affected complainants. We investigated what could be done to reduce their negative impacts and ensure care for complainants while they give their evidence. The analysis focussed in particular on what we noticed about communication and pastoral care practices and about the key points of tension that arose for complainants from the particularities of the evidence that they were giving. The aim of this research is to generate change and improvement for adult sexual violence complainants going to court. Thus, the focus of the chapter was on demonstrating what could be done differently through personal and trial management practice, within the law and the adversarial trial process as it currently is.

We noticed significant variation in practice regarding care-focussed judicial communication with the complainant in the principal study. This is especially problematic in our view, because of the very high level of vulnerability we observed in the social and personal circumstances of some of the complainants in these cases. Regrettably, it did not appear that the variation in judicial communication with, or care for, complainants was related to the need or presentation of the particular complainant. In some cases, in which there was minimal interaction, factual or personal circumstances suggested the complainant was especially vulnerable to re-traumatisation. Rather, variation seemed to be related to the individual style or preference of a particular judge.

Complainant participants in the recent evaluation of the Pilot reported that “feeling well looked-after” by court professionals including the judge, contributed to them being better prepared and more resilient to the process of giving evidence.<sup>127</sup> How they are treated by agents in the criminal justice system, including in the courtroom, can also help complainants to experience a degree of procedural justice or ameliorate some of the worst aspects of experiencing or reporting rape.<sup>128</sup> Research on the effects of trauma on adult sexual assault victims confirms that the compassionate treatment of complainants engaging with the criminal justice system can be protective and contribute to the process of recovery.<sup>129</sup>

127 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Ltd/Ministry of Justice, Wellington, 2019) at 72.

128 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Ltd/Ministry of Justice, Wellington, 2018) at 82; Michele Burman and others *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, Edinburgh, 2007) at 129.

129 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 24–27 and 32–35; Cameron Boyd *The Impacts of Sexual Assault on Women* (Australian Centre of the Study of Sexual Assault, 2011) at 5.

Victims also have the legislative right to be treated compassionately and respectfully by all agents across all aspects of the criminal justice system.<sup>130</sup> Those rights do not vanish at the courtroom door and need not impinge on a defendant's fair trial rights, particularly if caring and compassionate treatment is consistently afforded to all victims, and indeed all trial participants.

For these reasons, our recommendation is that all judges sitting in sexual violence trials should receive education in best practice and trauma-informed methods for communicating with and assisting complainants of sexual violence. Prosecutors may also benefit from this type of education. In-courtroom pastoral care by prosecutors was relatively rare. However, analysis of what did occur suggested that simple practices, such as addressing complainants by name, could be adopted without breaching the prosecutorial duty of impartiality. The *Solicitor-General's Guidelines for Prosecuting Sexual Violence* have expanded guidance to prosecutors on the use of complainant-centred practice, and we support the changes in emphasis. There is a strong and growing evidence base that trauma-informed approaches throughout the criminal justice system can lessen the occurrence of re-traumatisation and may contribute to improved evidence by reducing stress and improving recall. We argue that the findings and examples provided above demonstrate that good practice in this regard is possible but is not yet occurring in many trials.

We recommend the increased use of section 9 statements of agreed facts, in appropriate cases, to manage matters such as details of penetration, names of body parts and information about social media use and conventions. Attention to these considerations should happen pre-trial, and require careful communication with the complainant and her support. The lack of understanding of, and attention to, the particular cognitive and communication needs of complainants, especially in the cases in the principal research, need to be addressed. Use of psycho-social court preparation services may be a more effective, and attuned, way to make appropriate inquiries and, when necessary, inform the prosecutor of arising communication issues including the need for an expert communication assistance assessment where that is apparent.

Analysis of the use of EVIs as an alternative way of giving evidence in these studies demonstrates that there are a number of factors affecting whether the playing of the EVI is in the interests of complainant well-being in a particular trial. This includes the impact on the complainant of the time taken to present her evidence in chief, particularly where the combined length of the EVI and the amount of time additional questioning is likely to take is considerably in excess of the time that oral evidence in court, or via CCTV, alone might take. Another consideration is whether the complainant is likely to experience particularly

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130 Section 7 of the Victims' Rights Act 2002.



confrontational questioning early in cross-examination and therefore whether having an opportunity to answer questions about the event in advance of that might be protective. It may be relevant to consider if the complainant might benefit from a particular alternative way if she has communication assistance needs. How confident the complainant might be in communicating her evidence in the question and answer format or in a chronological order, may also be relevant to her experience of evidence in chief.

This chapter has demonstrated that good practice in care and assistance to complainants while they give their evidence exists and is developing. However, more could, and should, be done.

## CHAPTER FIVE

## ADMISSIBILITY DECISIONS IN ADULT RAPE CASES: EVIDENCE OF THE COMPLAINANT'S DISPOSITION IN SEXUAL MATTERS

### *Introduction: rules and application*

There are many admissibility rules that are regularly at issue both in cases of sexual offending as well as in a wide range of other criminal cases. The admissibility rules in the Evidence Act 2006 that apply only to sexual cases (criminal proceedings) are section 44 (“evidence of sexual experience of complainants in sexual cases”) and section 88 (“restriction on disclosure of complainant’s occupation in sexual cases”).<sup>1</sup> These two rules, and their application in the principal research cases and pilot study, are discussed first – section 44 is covered in this chapter and section 88 is discussed in Chapter Six.

While the Act contains many specific admissibility rules, all are variations of the fundamental inquiries concerning relevance, probative value and prejudicial effect. For example, the admissibility test in section 44(3) requires that the evidence be of “such direct relevance ... that it would be contrary to the interests of justice to exclude it”, and is therefore an inquiry into the sufficiency of the probative value of the evidence, as is the test in section 88. Sections 25 and 37 also contain heightened relevance tests worded as inquiries into the substantial helpfulness of the evidence. Section 35 is an exclusionary rule with exceptions, such that otherwise time-wasting (not sufficiently probative) evidence gains sufficient relevancy if it is responsive to an issue at trial.

The fact that all rules relate back to the principles of admission means decisions about the relevance of a piece of evidence must be carefully evaluated in the context of any critical assessment of trial process. Many academics and judges have observed that the decision about relevance (a logical connection between the purpose of offering the evidence and the issue at trial) rests on contestable assumptions about “common sense” and the world views of “reasonable” people. Some note that common sense “is highly acculturated and differentially distributed.”<sup>2</sup> Judges (when making admissibility rulings) and fact-finders (when making decisions about what occurred) perform their relative tasks of drawing inferences

1 Section 127 is a direction that applies only in sexual cases (see further Chapter Nine).

2 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2ed, Oxford University Press, Oxford, 2010) at 146.

by referencing their own beliefs and assumptions about the world, which include prejudices as well as knowledge:<sup>3</sup>

*Personal experience, and the beliefs which go with it, are moulded by all of the major psycho-sociological variables: class, sex/gender, age, ethnicity, nationality, and religion. There is consequently much variation between differently-situated groups and individuals, and this has important implications for some of the generalizations available to fact-finders in legal proceedings.*

In *Cross on Evidence* it is acknowledged, in relation to syllogistic (deductive) reasoning used to determine relevance, that “the most appropriate way of stating the major premise may be controversial: this depends on one’s experience of human nature and the world.”<sup>4</sup> Feminist researchers, examining the gendered operation of the rules of evidence, observe that decisions, especially ones about relevance and probative value “are inextricably intertwined with [the] identity and standpoint” of the decision-maker.<sup>5</sup> William Twining has also written:<sup>6</sup>

*In respect of any ... generalization one should not assume too readily that there is in fact a “cognitive consensus” on the matter. The stock of knowledge in any society varies from group to group, from individual to individual and from time to time. Even when there is a widespread consensus, what passes as “conventional knowledge” may be untrue, speculative or otherwise defective; moreover “common-sense generalizations” tend not to be “purely factual” – they often contain a strong mixture of evaluation and prejudice, as illustrated by various kinds of social, national and racial stereotypes.*

In *R v Seaboyer*, a Canadian Supreme Court decision concerning the admissibility of sexual history evidence about a complainant, L’Heureux-Dubé J stated, when considering assessments of relevance in that context:<sup>7</sup>

*Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge’s experience, common sense and/or logic. There are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth ... This area of the law has been particularly prone to the utilization of stereotype in the determination of relevance.*

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- 3 At 147. See also: David Tanovich “Regulating Inductive Reasoning in Sexual Assault Cases” in Benjamin Berger, Emma Cunliffe and James Stribopoulos (eds) *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (Toronto, Carswell, 2017) 73; Elizabeth Thornberg “(Sub)Conscious Judging” (2019) 76 *Washington and Lee Law Review* (forthcoming).
  - 4 D L Mathieson *Cross on Evidence* (8ed, LexisNexis, Wellington, 2005) at 26.
  - 5 Mary Childs and Louise Ellison “Evidence Law and Feminism” in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (Cavendish, London, 2000) 1 at 6.
  - 6 William Twining *Theories of Evidence: Bentham & Wigmore* (Weidenfeld and Nicolson, London, 1985) at 146.
  - 7 *R v Seaboyer* [1991] 2 SCR 577 at 228.

This oft-quoted critique of the relevance inquiry is particularly apposite in the context of this research project, which is focussed on the reliance on, or reinforcement of, stereotype and myth in adult rape trials. The following analysis of the admissibility rules that govern evidence of a complainant's sexual disposition will in part focus on what contestable world views underpin admissibility decisions in such contexts. This research demonstrates that decisions about relevance and probative value still draw on particular kinds of experience as well as beliefs about human behaviour that are "not always securely rooted in empirical observation and experience".<sup>8</sup>

### **Sexual history evidence (section 44)**

A critique of the historical approach to questioning complainants about their sexual past is succinctly stated by Paul Roberts and Adrian Zuckerman:<sup>9</sup>

*Over the years some strange notions of relevance became embedded in the common law. For example, it was assumed that evidence of prostitution diminishes the credibility of a rape complainant and increases the probability that the intercourse was consensual, when, on a dispassionate appraisal, one might expect prostitutes to be the last people to make false allegations of rape, since sending customers to gaol can hardly be good for business. Equally, a promiscuous person is not the most likely to concoct a false allegation in order to protect her reputation, nor would one particularly expect a sexually experienced person (as opposed to a shrinking violet with no previous sexual history to exploit) to be overcome by shame or remorse into falsely accusing her partners of rape. All-too-frequently, it would appear, the real purpose of such cross-examination was to suggest that the complainant was herself too morally flawed to deserve the court's sympathy or to justify punishing the accused.*

In response to concerns about stereotypical inferences about women's sexuality and credibility, section 23A of the Evidence Act 1908 was introduced in 1977.<sup>10</sup> Section 23A was largely reproduced in the Act as section 44, which currently limits the admission of evidence of the complainant's sexual experience with any person **other than the defendant**, and is the Aotearoa New Zealand equivalent of what is referred to in some other jurisdictions as a "rape shield" provision. It provides:

<sup>8</sup> Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2ed, Oxford University Press, Oxford, 2010) at 165.

<sup>9</sup> At 443. See also T Brett Dawson "Sexual Assault Law and Past Sexual Conduct of the Principal Witness: The Construction of Relevance" (1987) 2 Canadian Journal of Women and the Law 313 at 328: "Information made available to a jury concerning the principal witness's past sexual activity or non-conformity to a sex-role increases the responsibility for the assault that is attributed to her at the same time that it decreases perceptions of the accused's guilt."

<sup>10</sup> Elisabeth McDonald "From 'Real Rape' To Real Justice? Reflections on the Efficacy of More Than 35 Years of Feminism, Activism and Law Reform" (2014) 45 Victoria University of Wellington Law Review 487 at 490.

#### 44 Evidence of sexual experience of complainants in sexual cases

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
- (1A) Subsection (1) is subject to the requirements in section 44A.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
- (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).
- (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.
- (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

In *B (SC12/2013) v R* the Supreme Court noted the rationale of the section:<sup>11</sup>

*Rape shield provisions control the extent to which complainants in sexual cases may be questioned about their previous sexual history. Such provisions are intended to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based on erroneous assumptions arising from a complainant's previous sexual history.*

In the Law Commission's recent report of their second review of the Evidence Act 2006, the Commission described the purpose of section 44 in the following way:<sup>12</sup>

<sup>11</sup> *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53].

<sup>12</sup> New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at 49. (Citations in original omitted.)

- [3.6] The purpose of the rape shield provision is to protect complainants from unnecessarily intrusive and embarrassing questioning about their sexual history. Research indicates that such questioning can make complainants feel they are on trial rather than the defendant. The rape shield provision recognises that it is evidence relating to the particular incident that should inform the outcome of the proceedings rather than evidence of earlier events in the complainant's life. As the Supreme Court has recognised, trials for sexual violence offences should not be "derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences".
- [3.7] A related aim of the provision is to prevent sexual history evidence being used to support two erroneous assumptions. The assumptions are that, because a complainant has a particular reputation, disposition or experience in sexual matters, either:
- they are the kind of person who is more likely to have consented to sexual activity on this occasion; or
  - they are less worthy of belief than a complainant who does not have those characteristics.

These contestable historical beliefs (that sexually active women are less credible and are more likely to consent to sex) are sometimes referred to as the "twin myths" that rape shield statutes have been put in place to counter.<sup>13</sup>

The principal rationale for provisions like section 44 is therefore to prevent the admission of evidence about a complainant's sexual behaviour (usually through cross-examination) when it is of little relevance (to the main issues at trial of consent or credibility) and may be distressing or re-traumatising for the complainant. Applying just a mere relevance test to such evidence has historically permitted too many collateral and unfairly prejudicial inquiries. In particular, section 44 was enacted to prevent an illegitimate link being made between a complainant's sexual experience and the likelihood of her lying about the particular allegations.

Criticisms of the substance and application of rape shield statutes have nevertheless been constantly expressed – both locally and in many comparable overseas jurisdictions. One of the aims of this research was to explore the operation of the rules of evidence during the trial process, as many admissibility decisions, if not challenged on appeal either pre-trial or post-conviction, are not available on publicly accessible databases. Section 44, which only applies in sexual cases, was therefore a particular focus in determining whether admissibility decisions about sexual behaviour rely on contestable assumptions about the forensic significance of such behaviour.

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13 Clare McGlynn "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 *The Journal of Criminal Law* 367 at 369.

It is of course inevitably a key trial strategy in cases where consent is at issue to construct the sexual interaction at issue as normal conduct, not criminal offending.<sup>14</sup> Offering evidence of the complainant's sexualised behaviour with another person (or the defendant) is a regular aspect of this strategy. However, such evidence has the potential to distract the jury from the need to focus on the events at issue.

Given that this research involves adult rape cases, where the issue was consent, it was unsurprising that in all cases in the principal research except one, *Patel*, evidence was offered or sought to be offered about the complainants' disposition in sexual matters.<sup>15</sup> In the pilot study there was also only one case in which no evidence about the complainant's disposition in sexual matters was offered or sought to be offered (*Salah*).<sup>16</sup> The consideration of the admission of this evidence in the cases resulted in three main areas of critique:<sup>17</sup>

- (1) What behaviour is, or should be, caught by section 44(1) – that is, what is evidence of “sexual experience”?
- (2) To what extent is evidence of complainant behaviour categorised as outside the scope of section 44(1) admitted, even when it is either irrelevant (section 7), or insufficiently probative (section 8)?
- (3) Is the heightened relevance test for admission in section 44(3) being applied in a consistent way and in keeping with the rationale of the provision?

In the final stages of this research, the Law Commission was undertaking the second review of the Evidence Act 2006. The Commission focussed on the scope of section 44(1),<sup>18</sup> and on whether the application of section 44(3), specifically with regard to alleged previous false complaints of sexual offending, was causing any difficulties in practice following the Supreme

14 Clare McGlynn “Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence” (2017) 81 *The Journal of Criminal Law* 367 at 371; Aileen McColgan “Common Law and the Relevance of Sexual History Evidence” (1996) 16 *Oxford Journal of Legal Studies* 275 at 306.

15 In one case, *Kingsford*, the complainant was a sex worker at the time of the alleged rape and evidence of her occupation, usual interaction with clients and behaviour after the alleged rape (regarding sex with other clients) was all admitted without discussion of section 44, section 88 or sections 7 and 8. Although there was no information on the court file, presumably most of this evidence was admitted by consent. Cross-examination on the issue of when the complainant returned to work would have passed the section 44(3) test in our opinion, as it was responsive to the complainant's level of physical injury and pain.

16 In this case there was a minute on the file recording the Crown's decision to edit the complainant's pre-recorded evidential interview (EVI) so as there was no breach of section 44 (as no section 44 application was going to be made). This approach is consistent with the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (Crown Law, 2019) <https://www.crownlaw.govt.nz/assets/Uploads/Solicitor-Generals-Guidelines-for-Prosecuting-Sexual-Violence.PDF> at [11.2].

17 Other information about the operation of section 44 gathered during this research included when the admissibility inquiry was undertaken and the application of section 44(2).

18 New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018) at [3.7]–[3.8].

Court's decision in *Best v R*.<sup>19</sup> The Law Commission's conclusions and recommendations with regard to these matters is considered as part of the discussion of the findings of this research.

### ***The scope of section 44(1): what is “sexual experience”?***

As section 44(1) controls evidence of a complainant's “sexual experience” (with any person other than the defendant),<sup>20</sup> litigation has focussed on the meaning of “sexual experience”. Sometimes evidence of a previous complaint of sexual offending (by a person other than the defendant) may be categorised as “sexual experience”. This may be when evidence of prior sexual abuse is offered to explain the complainant's knowledge of sexual matters and behaviour.<sup>21</sup> In the pre-Act case of *R v M*,<sup>22</sup> a distinction was drawn between evidence of sexual knowledge (by observation or via media, for example, which did not require leave under the section 44 equivalent) and evidence of sexual experience with a person other than the defendant, which does require leave. The approach in *R v M* was applied in *M v R*, the Court of Appeal stating that “sexual knowledge lies beyond the reach of the section”.<sup>23</sup>

Other evidence falling outside the scope of section 44(1) has included evidence about the complainant not having a sexual transmitted infection.<sup>24</sup> In *Tautu v R* the Court observed that “[i]ntensity of feeling is not synonymous with sexual activity”,<sup>25</sup> and in *Jones v R* the Court of Appeal stated that sexual activity with another person just prior to the alleged offending is not “sexual experience”, since the language of the Act “indicates something that happened on a previous occasion”.<sup>26</sup>

19 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186; New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [3.54]–[3.69].

20 See New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [3.43]–[3.51] for recommendation on suggested extension to cover defendants.

21 See *R v Morrice* [2008] NZCA 261 at [32].

22 *R v M* (2000) 18 CRNZ 368 (CA).

23 *M v R* [2010] NZCA 620 at [23]. As a “central plank” of the Crown case in closing was that the complainant “could only have known about what she complained of if she had experienced it” without laying the foundation for this submission, the appeal was allowed (at [32] ff). In *C (CA634/2016) v R* [2017] NZCA 275 (application for leave to appeal declined: *C (SC75/2017) v R* [2017] NZSC 141); however, the Court considered an argument under section 44 based on acquisition of sexual knowledge by the complainants, but held that the admission of facts given to the jury regarding the source of the complainants' knowledge (which included the phrase: “[Since the 1990s] children can derive sexual knowledge from a number of different sources, irrespective of whether they have been sexually abused or not”) “meant that the complainants' sexual knowledge was irrelevant to the issues before them” (at [26]).

24 *Harwood v R* [2010] NZCA 545 at [28].

25 *Tautu v R* [2017] NZCA 219 at [21].

26 *Jones v R* [2018] NZCA 288 at [50]. In *Grooby v R* [2018] NZCA 344 conduct on the night (the defendant's sexual interaction with the complainant's father) was also treated as falling outside the definition of propensity in section 40(1).



In *B (SC12/2013) v R*, William Young J, dissenting, was of the view that sexual “experience” should “be restricted to things that have happened, rather than encompass[ing] things that have not”. The majority held that the proposed use of the evidence should guide interpretation, meaning that in the context of the particular case the evidence (of something that did not happen) was subject to section 44(1).<sup>27</sup>

*The fact that no sexual conduct occurred does not take the incident outside the scope of “sexual experience” with another. If the complainant had actively propositioned the proposed witness to have sexual intercourse with her and he had refused, evidence of that would undoubtedly be evidence of sexual experience with another.*

The majority’s judgment in *B (SC12/13)* was relied upon by the Court of Appeal in *R v Singh* when concluding that (sexually explicit) text messages can amount to evidence of a person’s “sexual disposition” (referred to in the definition of propensity in section 40) and thereby be dealt with under section 44, even though no physical contact takes place.<sup>28</sup> In *Best v R*,<sup>29</sup> the Supreme Court left open “the issue of whether section 44 should be interpreted from the perspective of the complainant”, such that the section would have applied even if M [another alleged offender] had maintained that there had been no sexual activity at all.<sup>30</sup> After their review of the case law in the 2018 Issues Paper, the Law Commission stated “there seems to be a consensus that evidence about [the complainant’s] virginity is captured by the terms ‘sexual experience’ in section 44(1)”.<sup>31</sup>

It is perhaps not surprising the difference of views at appellate level have led to some inconsistencies of approach in the trial courts – although the variations are sometimes about matters which have not been considered by the Court of Appeal since the Evidence Act 2006 came into force.

### **Evidence about the complainant’s disposition in sexual matters considered to be outside the scope of section 44(1) in this research**

In 10 cases (out of the 30 cases in the principal research) evidence was offered of the complainants’ disposition or propensity in sexual matters (in all cases this was offered by the defence, but in six of the cases, it was also led by the Crown), but no section 44 analysis was applied to the evidence.

27 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [60].

28 *R v Singh* [2015] NZCA 435 at [25]. See also *Merckens v R* [2011] NZCA 508 at [10].

29 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

30 At n 45.

31 New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018) at [3.25].

This evidence concerned:

- ▶ Flirtatious (sexualised) behaviour by the complainant with another person on the night of the alleged rape;
- ▶ Possession of sex toys by the complainant;
- ▶ The complainant's preferred contraception methods;
- ▶ Previous pregnancies and number of children;
- ▶ Lack of any previous sexual experience or none of the particular type alleged; and
- ▶ The complainant identifying as gay and not interested in men.

In all these cases, the evidence was admitted without reference to section 44 but there was also no discussion (either pre-trial or prior or during the complainants' evidence) as to the relevance of the evidence or its probative value to an issue in the case (sections 7 and 8).<sup>32</sup>

In the pilot study, evidence about the complainants' disposition or propensity in sexual matters was offered in four cases in which a decision was made either that section 44(1) did not apply, or no admissibility enquiry was made (and presumably the evidence was considered to be admissible as being sufficiently relevant pursuant to sections 7 and 8). The evidence in these cases was of:

- ▶ Lack of sexual experience of the type alleged;
- ▶ The complainant's "uninhibited dancing" earlier in the night (with the defendant and subsequently other people);
- ▶ The complainant's sexual orientation; and
- ▶ The complainant having kissed the defendant's wife on an earlier occasion.

### Flirting on the night with another person

In *Wilde* it was alleged that the defendant (Ben) raped the complainant (Alice) at a hostel, while she was asleep in bed, following a night when a group of their mutual friends had been drinking together at a bar. Ben's defence was that any sexual activity he had with Alice was consensual, but that it did not include sexual intercourse. During cross-examination Alice was asked about her interaction with the barman earlier in the night:

**Q:** *Was there anyone in the bar that night that you were getting along with better than others, or in particular?*

**A:** Yes.

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<sup>32</sup> In *Vandenberg* a (related) admissibility ruling was regarding a question to be asked during the cross-examination of a Crown witness who would be asked to give opinion evidence about whether she thought the complainant was a "committed lesbian" or just going through a phase. The judge permitted the question to be asked.

- Q: *Who was that?*  
 A: *The bartender, Callum.*  
 Q: *How were you getting along with Callum that night?*  
 A: *We were just getting along really well, he was flirtatious, I was flirtatious, I was enjoying his company.*  
 Q: *Did anything happen between you and the bartender in the bar?*  
 A: *Yes.*  
 Q: *What was that?*  
 A: *Ah, we had hugged and we shared a kiss.*  
 Q: *Was the defendant there when that happened?*  
 A: *Yes.*  
 Q: *Other than the kiss, was there anything further between you and the bartender that evening?*  
 A: *The bartender had suggested that I come back to where he lived and spend the night.*  
 Q: *What did you say to that?*  
 A: *No.*

The possible arguments as to why this evidence was not the subject of a section 44 analysis are either that the events occurred close in time to the alleged offending, or that it was not evidence of “sexual experience”. While hugging and kissing a person is not “sex” in ordinary language usage, it is certainly evidence of sexualised behaviour. Further, while there is subsequent Court of Appeal authority that sexual behaviour with another person on the night that is closely related to the alleged offending is not caught by section 44(1),<sup>33</sup> this is not evidence of that kind. It was not part of a continuous chain of events. It is evidence of how Alice was behaving earlier in the night while out drinking and socialising with a group of people, including the defendant Ben (to the extent he was in the bar for some of the time). Given the rationale for section 44, this evidence should only have been admitted if the test in section 44(3) was satisfied.

Even if section 44 does not apply to this evidence, it is difficult to see its relevance to the issues at trial. The evidence is part of the narrative leading up to Alice going to bed that she had been out drinking and socialising as part of a group she had met up with at the hostel. The fact that Alice had hugged and kissed someone else earlier in the night is not relevant to the existence of, or consensual nature of, any sexual conduct with Ben. There is much Court of Appeal authority on this point.<sup>34</sup>

<sup>33</sup> *Jones v R* [2018] NZCA 288 at [49]–[50].

<sup>34</sup> *R v Singh* [2015] NZCA 435 at [33]; *Tutu v R* [2011] NZCA 527 at [48]; *Merckens v R* [2011] NZCA 508 at [4]; *Pegler v R* [2015] NZCA 260 at [25]; *Wallace v R* [2018] NZCA 2 at [14]; *Jones v R* [2018] NZCA 288 at [42].

In *Moss*, similar evidence was offered by the prosecution, also without consideration of section 44. It was agreed that the complainant Vivienne’s alleged “flirting” behaviour with the defendant, Bevan, previously in the evening, was outside section 44(1) and admissible as relevant to whether Vivienne consented to having sex with Bevan.<sup>35</sup> Vivienne was, however, also asked in examination-in-chief whether she was flirting with another man (Aaron) at the party, and then texting him later in the evening:

Q: *And so, in terms of that [early morning] text from Aaron, do you have any recollection of it?*

A: *No.*

Q: *But just in terms of Aaron –*

A: *Yes.*

Q: *– how did you get on with him that night?*

A: *He was very similar to [ ], my ex-partner.*

Q: *And so, when you had been speaking to him, can you just describe it.*

A: *He was younger. We were flirting, I guess, he was a younger guy.*

During cross-examination the following interchange occurred:

Q: *You were all over everyone?*

A: *No.*

Q: *And you spoke to Aaron outside didn’t you.*

A: *Yes.*

Q: *Sort of rubbing and touching yourself on Aaron?*

A: *No.*

Q: *And that was after you’d been doing something similar to Bevan isn’t it?*

A: *No.*

Q: *And you don’t agree you were sitting on Bevan’s lap putting your arm around his neck?*

A: *No.*

Q: *You didn’t kiss him in that room?*

A: *No.*

A question about whether she was “all over” Aaron, “rubbing or touching” him (a person other than the defendant), should have been the subject of a section 44(3) ruling, and excluded. The fact that Vivienne was flirting with (or even kissing) Aaron at the party is

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35 See further below at [186](#).

irrelevant to whether she would consent to sexual intercourse with a different man in her own home after having gone to sleep there in the early hours of the following morning. Nor should such evidence be viewed as relevant to the defendant's belief in consent.

In one case in the principal research (*Yamada*), section 44 was considered by the judge when determining whether the admissibility of the defendant's (Rangi's) pre-trial statement to the effect that the complainant (Grace) was "dirty dancing" with some other men the night of the alleged rape. A group of workmates were drinking and socialising with each other. Grace became intoxicated and was put to bed by a colleague. She woke up to find Rangi having sex with her. His defence was that it was consensual.

In a pre-trial ruling, the judge held that the evidence of Grace dancing in an allegedly provocative way on the night with another man was subject to section 44(1) and inadmissible:

*In my view, having regard to the wide definition of sexual experience established in those cases the assertion of sexualised dancing involving physical contact between the complainant and males at the parties is evidence of sexual experience for the purposes of section 44. I am fortified in this conclusion when I consider that the only possible effect of the evidence is to suggest promiscuity on the part of the complainant and to promote an inference that she was therefore more likely to have consensual sex with persons at the party. This is precisely the reasoning which is curtailed by section 44.*

*Having come to the conclusion therefore that the evidence under discussion does amount to evidence of sexual experience on the part of the complainant, the test under section 44 must be met before permission can be granted for the evidence to be put before the jury and for the reasons given earlier the test is not met in this case and that part of the defendant's statement is excluded.*

We prefer the approach of this judge with regard to both the scope of section 44 and the application of the admissibility test.

In the Pilot case of *Cropp*, the complainant, Paige, was close friends with a woman, Rikki, and her husband, Jeremy (the defendant). They would often socialise and drink quite heavily together. Paige said that after drinking with the couple at their house one night, she became very intoxicated and Jeremy raped her. During examination-in-chief, without a section 44 ruling, Paige agreed that about eight months prior to the alleged rape, she kissed Rikki (the defendant's wife) after they had been drinking. During cross-examination Paige confirmed that she had oral sex with Rikki that same night, while Jeremy was there. She also later kissed Jeremy – but she was clear that it was not a threesome and the interaction between her and Rikki ended when Jeremy expressed an interest in having sex with Paige.

Despite anything to the contrary in the Court of Appeal decision in *Jones*,<sup>36</sup> we are of the view that the sexual interaction between Paige and Rikki was admissible only if sufficiently relevant in terms of section 44(3). Given the issue at trial was whether Paige consented to having sex with Jeremy, it is difficult to see the relevance of evidence that she had previously kissed Rikki. The other line of questioning in cross-examination was aimed at suggesting that Paige was in the habit of undertaking sexual conduct with Rikki (and Jeremy) and then feigning a lack of memory – so her previous sexual conduct was used to both indicate consent **and** a lack of credibility.

The case also raises the issue of the relevance of previous sexual conduct with the particular defendant, currently outside the scope of section 44(1) but still subject to sections 7 and 8. In *Cropp*, no concern was seemingly expressed that evidence that the complainant (Paige) kissed the defendant (Jeremy) **eight months prior to the alleged rape** should be admitted to establish consent to sexual intercourse on the night in question.<sup>37</sup>

### Possession of sex toys by the complainant

In *Harris* the complainant (Megan) did not deny her possession of a range of sex toys in her bedside table. She alleged that Jayden, whom she had met online, raped her and anally violated her following a period of consensual sex. Jayden claimed all the sexual interaction was consensual and, in support of that defence, claimed knowledge of the toys and asserted that they had used them together. Megan gave evidence that she only ever used them by herself, never with a partner.

No section 44 analysis was applied to this evidence, perhaps because evidence of possession is arguably not “sexual experience of the complainant with any person other than the defendant” (section 44(1)), nor is use of sex toys if it is not sexual activity with “another” person (on the basis that the complainant cannot also be “any person” for the purposes of the section).<sup>38</sup> However, we are of the view that the evidence of a complainant’s possession of sex toys should fall within the definition of section 44(1), given that it is evidence about a complainant’s sexual expression and disposition and gives rise to the same policy concerns as sexual activity with another person, when offered to prove consent or undermine credibility.<sup>39</sup>

36 In *Jones v R* [2018] NZCA 288 the Court of Appeal expressed the view that section 44(1) did not apply regarding evidence of a threesome involving both the defendant and the complainant: at [39]–[41]. In *Cropp*, however, there was no evidence of a threesome, despite the defendant being present for part of the time.

37 See discussion below at 194.

38 See further discussion of the cross-examination of Megan on her possession of sex toys in Chapter Eight at 356.

39 See the Law Commission’s discussion of this example, which we provided during the consultation period: New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [3.9], [3.17]–[3.21].

### Use or possession of contraception

In a number of cases, evidence of the complainant's contraception use was admitted. In three of these cases, questions about contraceptive use was not subject to a section 44 inquiry.

In the first case, *Simon*, the complainant, Parvin, said she was very intoxicated when she had sex with Haris, whom she did not know prior to the alleged offending, which took place in a public toilet. Haris said that the sex was consensual, while Parvin gave evidence of having very little memory of the events but said it was rape. During cross-examination Parvin was asked about what was discussed about contraception:

Q: *When you were in the toilet with this young man, did you ever say to him when the sex was taking place, did you ever discuss whether you were on – using contraceptives –*

A: *No.*

Q: *– or condoms?*

A: *No.*

Q: *You don't remember him mentioning the word "condoms"?*

A: *No.*

Q: *And you don't remember saying that you were on the pill?*

A: *I've never been on the pill.*

The only other line of questioning about what Parvin said to Haris during the alleged rape was to do with the type of underwear she was wearing. Given that in most situations, women will have experience using contraception because they are sexually active, questions about contraceptive use will usually infer they have had sex with a person other than the defendant. In *Simon* the only relevance of putting to Parvin a conversation about **contraception use** must be to infer something about consent<sup>40</sup> – that is, if a complainant and defendant talk about condom use, or being on the pill, during the time of, or just prior to the alleged rape, that is indicative of consensual sexual intercourse. We consider such evidence is irrelevant for this purpose, and is inadmissible regardless of whether it falls within section 44(1).

A slightly different use of evidence about the complainant's use of contraceptives arose in *Carter*. In this case, the complainant Theresa had met Zachery online and subsequently in person on a couple of occasions. Theresa gave evidence that she kissed and was intimate with Zachery on the day of the alleged rape, but made it clear she did not want to have sexual

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40 It is possible that evidence of this conversation the defendant alleged took place was to indicate how intoxicated Parvin was, or as a challenge to her version of events, but we consider it must still be subject to section 44 if it also is evidence of her disposition in sexual matters.

intercourse. On an earlier outing together, a week before, the two had talked about sexual health (and also had consensual sex on that occasion). Theresa was asked questions about this discussion regarding sexual health during cross-examination:

Q: *So, there was quite a discussion about sexual health and risks of having unprotected sex before you engaged in intercourse?*

A: *Yes.*

Q: *He told you didn't he that he was concerned about sexual health issues and you said the same, it was quite a frank discussion, that's right?*

A: *I wouldn't call it frank but it was a discussion that happened, it wasn't the highlight or the focus of the morning.*

Q: *He was also a little concerned about unwanted pregnancies?*

A: *Yeah, he knew I was on the pill.*

Q: *You told him, did you?*

A: *I told him I was on the pill, so – and that I didn't want to have kids.*

Q: *That wasn't on your agenda at this stage of your life?*

A: *No, no.*

Q: *So, you were in agreement about that?*

A: *Yes.*

Q: *It would be fair to say that you were both able to talk about sexual matters when you became engaged in sexual conduct, what you liked and what you didn't like and that sort of thing?*

A: *No.*

In this line of questioning the main purpose appears to be constructing the interaction between Theresa and Zachery as positive with good and clear communication about sexual matters (outside the current scope of section 44(1)) – however, in the context of referring to the conversation for this purpose, Theresa also accepted that she told Zachery she was on the pill. The fact that a complainant is using contraception does infer the existence of prior sexual activity with a person other than the defendant. The fact that Theresa is on the pill does not seem relevant to the issues at trial – that is, how is this fact relevant to her consenting to have sex with Zachery, or Zachery's belief that she was consenting? Notably in this case too, evidence of previous consensual sex with the defendant (a week previously) was admitted without discussion – although while such evidence is not currently captured by section 44, it must still be relevant and sufficiently probative.<sup>41</sup>

41 See further the discussion at [191](#).



While there was no information given by the complainant in *Cropp* about her preferred method of contraception, it appears that a doctor later did give evidence about her prescription for the pill, allowing the foundation for a submission during the defence closing that the contraceptive choice was an indicator of consent to the defendant ejaculating inside her:

*We also know that one of the medications taken by Paige was an oral contraceptive which was consistent with her consenting for him to cum inside her ... His evidence is that she made a noise of agreement and then nodded and we know what happened after that. But she nodded, according to Mr Cropp's evidence, to say, "Yes you can." And what a coincidence. It was okay because we found from Dr [ ] ... that one of the prescription pills she was on was the oral contraception. Is that more than just a coincidence?*

In *Tait* the prosecutor led evidence of the complainant's (Zoë's) lack of birth control at the time in order to make the argument that she would not have consented to have unprotected sex. There does not appear to have been any objection to the admission of this evidence. In *Masters* a section 44 application was successfully made to admit evidence of the complainant previously having had unprotected (consensual) sex,<sup>42</sup> which would indicate the existence of a belief that juries would consider consensual sex less likely in the absence of protection. The corollary to that belief, that use of contraception makes consent more likely, is more problematic. The fact that a woman is taking oral contraceptive pills, or has condoms in her bag or bedside table, should not indicate a willingness to have sex in and of itself.

A variation of this scenario arose in the Pilot case of *Waititi*, in which the complainant, Livi Fan, had told the police that when the defendant, Iain, was in her bedroom, before the alleged rape, he picked up a condom and started talking to her about it. She did not report that interaction in her second statement to the police and the defence asked permission to cross-examine on the point to expose the inconsistency. Pre-trial it had been agreed there would be no reference to the condom, and pictures of it had been taken out of the booklet of photographs. The prosecution argued that evidence that a condom was found in Livi's room infringed section 44, regardless of the use to be made of the evidence. The trial judge was not convinced that the evidence did engage section 44, but applied both section 44 and sections 7 and 8 in ruling that the defendant was entitled to cross-examine Livi about the condom conversation:

*You wish to cross-examine Ms Fan about what she related to the police in the interview that she first gave on [date]. The particular reference that [defence counsel] is interested in was a reference to you finding a condom on the floor and there being some discussion about that before you then allegedly continued to rape her.*

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42 See below at 172.

*That was a version of events that was part of a longer narrative that was included in the first statement that she gave to the police, but not included in the second statement that she gave to the police. You argued that it was forensically useful for two reasons. Firstly, it provided evidence of an inconsistent statement. Secondly, that it raised questions as to how plausible that version of events could be and therefore that both of these issues were relevant to Ms Fan's credibility ...*

*You are therefore, and were therefore, allowed to question Ms Fan about the condom reference under section 44. That questioning was limited to the terms of the disclosure that she made in the interview that she gave to the police on [date]. You were not permitted to go beyond that to address issues such as whether there actually was a condom found, whether it was an empty wrapper or a full one. If it was an empty wrapper, where and when the condom might have been used and with whom.*

In this ruling the judge is seeking to avoid any (impermissible) inference that the condom was in Livi's possession and indicative of her being sexually active (the reason the Crown argued that the evidence potentially engaged section 44). If evidence of the presence of a condom in Livi's bedroom does engage section 44 (we agree that it does), then the heightened relevance test in section 44(3) must be satisfied. The fact that there is an inconsistency between the two accounts about this evidence does not, in our view, meet the threshold for admissibility in section 44(3) or in section 7 (see further the discussion on this point in the consideration of *Nash*, below).<sup>43</sup>

The second use of the evidence, to challenge the complainant's evidence by suggesting it would be highly unlikely that there would be talk about condoms in the context of a rape, also lacks sufficient probative value, given the risk of the impermissible inference. The defendant put both alternative propositions about this evidence to the complainant during cross-examination: (1) was this talk not a clue that sex was about to occur, and if so, so why did she not call out if she did not want sex?; and, (2) that there was no talk about a condom at all – she just made it up:

**Q:** *Do you agree that someone picking up a condom and having a chat with someone about it is not really consistent with someone who's engaged in non-consensual sexual activity?*

**A:** *I think the word is "talk", not "chat".*

**Q:** *If it's correct that Mr Waititi picked up a condom and started chatting to you about it or talking to you about it, you must have had a sense that there was a possibility that he may attempt to have sexual intercourse with you, right?*

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43 See also the discussion cross-examination on inconsistencies more generally in Chapter Eight at 329.

A: Yes.

Q: *Well did you think that might be a good time to call out to your flatmates who were sleeping metres away from you?*

A: *Once again, that's something that would seem in a black and white world to be the obvious thing to do, but it's not always the case.*

Q: *What did he talk to you about when he held this condom?*

A: *I don't remember and I obviously didn't remember then if I hadn't put the specifics of it [in my statement].*

Q: ***There was no discussion about a condom that night was there, Ms Fan? That's just another thing you've made up in terms of your allegations?***

A: *Well if I'd said it to the police officers then that's what I believe happened at the time.*

The consequence of numerous references to the “condom talk” in the cross-examination allows reinforcement of its presence and, we say, increased the likelihood of the jury drawing an impermissible inference as to the complainant’s sexual availability, and therefore whether she consented.

### Number of children or pregnancies

As with (most) contraceptive use, the fact that the complainant has children, or has had unwanted pregnancies, terminations or taken the morning-after pill is also by implication evidence of previous sex. Currently, if the defendant was the father of the children, such evidence would not trigger section 44 – however, in the absence of medical intervention, having children with other partners *is* evidence of sexual experience with a person other than the defendant. Evidence of the number and ages of the complainant’s children may be relevant to issues of who was nearby when the alleged rape occurred or why the hallway light may have been on (*Elliot*), but in other cases the evidence is irrelevant and even unfairly prejudicial. For example, there seems to be no reason to ask the complainant in *Roberts* to list the names and ages of all of her children. In order to provide context and background narrative to the house dynamics, only evidence of the ages of the children living with her at home at the time of the alleged rape was in our view relevant.

Similarly, information about a young complainant (aged 17 or 18) having had a child is also often irrelevant to the issues at trial and exposes the complainant to assumptions being made about her sexual past, which section 44 is intended to control. Analysing the admissibility of evidence concerning the pregnancies and children of the complainant by applying section 44 allows greater protection of the complainant and robust consideration of the relevance of such evidence.

### Lack of any previous sexual experience, or lack of similar sexual experience

As previously discussed, evidence of a lack of sexual experience (virginity) has not always been held to fall within the scope of section 44, although recent authority suggests such evidence should be subject to section 44 and potentially admissible, depending on the issues at trial.<sup>44</sup> In *Devi*, evidence that the complainant (and her family) was of a particular religious faith that did not sanction sex before marriage was admitted without reference to section 44. According to the complainant, Kaia, her religious belief was one of the things the defendant (Ajay) asked her about at a community centre at which they were both volunteers. Ajay's defence was that the sex was consensual, and she was an interested and enthusiastic participant in part because of her lack of knowledge and experience. During cross-examination Kaia was asked how she felt talking about sexual matters with Ajay just before the alleged offending:

- Q: *Okay. Just, when you were giving your evidence earlier, answering questions from the Crown prosecutor, and you said you were talking about sex, rules in the church and the like, you said you were curious. What were you curious about?*
- A: *I was curious about sex.*
- Q: *And the things he was talking about?*
- A: *Yes.*
- Q: *Which are kissing?*
- A: *Yes.*
- Q: *The clitoris?*
- A: *Yes.*
- Q: *Other things, or were they the main ones?*
- A: *Sorry, can you repeat that?*
- Q: *Were there other sexual things he talked about as well?*
- A: *Yes.*
- Q: *And I think you agree do you that once you [changed locations] ... he carried on talking about sexual things?*
- A: *Yes.*
- Q: *For example, he talked about an orgasm?*
- A: *Yes.*
- Q: *Was that making you feel a bit uncomfortable?*

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44 New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018) at [3.25].

- A: Yes.
- Q: *And you say you weren't asking him about these things, it was him doing it or were you asking some questions as well?*
- A: *I don't remember.*
- Q: *Were the things he was talking about a bit foreign to you, a bit strange?*
- A: Yes.
- Q: *Things you didn't know a lot about?*
- A: Yes.
- Q: *And do I take it they're not the sort of things that are perhaps talked about in a [religious] household?*
- A: Yes.
- Q: *What effect did all that talk have on you?*
- A: *I was very curious.*
- Q: *And what effect did that have on you?*
- A: *I was uncomfortable, I didn't know what to do, but there was part of me that was really, really interested and I will be honest, I, I had tingles and –*
- Q: *What you told the police was, and you tell me if this is a fair way of how you felt.*

In this case, the complainant's religious background does have relevance to the interaction between Ajay and Kaia, although section 44 was not discussed. In the particular context, this evidence was not essential to the prosecution case, but arguably supported the defence argument that Kaia was a willing participant – although the logical connection is not strong. However, in other contexts lack of previous sexual experience, including lack of any history of the type alleged, can be viewed as relevant to rebut the claim that the conduct was undertaken consensually with the defendant. Case law under section 23A of the Evidence Act 1908 as well as the 2006 Act is at variance on this issue. Some appellate authority indicates such evidence is inadmissible with regard to the likelihood of consent, by analogy to the argument that previous (sexual) conduct should not be.<sup>45</sup>

One case in the principal research raised this issue, although section 44 was not considered and the evidence was admitted. In *Vandenberg* the complainant, Zara, met the defendant, Alain, at a bar. They did not know each other previously. Alain says they had consensual sex. Zara became intoxicated and has only a patchy memory of the evening. Zara identifies as gay and recounts during her evidence in chief that after she fell down some stairs Alain helped her outside to his car:

<sup>45</sup> *Leef v R* [2011] NZCA 567 at [16]; *Grace v R* [2011] NZCA 590 at [10]; *Hartley v R* [2014] NZCA 162 at [72]; *Henry v R* [2017] NZCA 92 at [15]; *Bruce v R* [2015] NZCA 332, (2015) 28 CRNZ 150 at [39].

- Q: *Whereabouts in his car were you?*
- A: *In the passenger seat.*
- Q: *What position were you in as in were you seated up or lying down?*
- A: *He had lowered the seat completely and pushed it back so I was lying down in the passenger seat.*
- Q: *Whereabouts was he?*
- A: *He was on top of me on the passenger seat side.*
- Q: *What was he doing?*
- A: *He was touching me and groping me and he had pulled down my dress and exposed my breasts and was sucking on my nipples and caressing me and whilst doing so was moaning and saying to me “you can’t be gay you’re too hot to be gay”.*
- Q: *Why did he say that?*
- A: *Because I had expressed that I was not interested in men and my cousin had also told him that I wasn’t interested in men.*
- Q: *When did you tell him that you weren’t interested in men?*
- A: *Upon meeting him in the bar.*
- Q: *What was your emotional state when you were in the car?*
- A: *I was very shocked, and I didn’t really understand what was going on, at which point I said, “No. What are you doing?”*
- Q: *When you said, “No. What are you doing?”, what was he doing?*
- A: *The next response I got was, “Don’t be silly. I’ll make you like men.”*
- Q: *And did you respond to that?*
- A: *I said, “No. This can’t be happening,” at which point he pulled out a line of condoms from the back seat of his car, and the next thing I remember is him thrusting inside of me.*

The interaction between Zara and Alain at the time of the alleged offending is relevant evidence, and it does allow the complainant to explain why Alain is saying certain things with reference to her previous statements to him that she is not interested in men. This is evidence of *lack* of a particular kind of sexual experience, and is sometimes ruled inadmissible, even where it may bolster the complainant’s evidence. During cross-examination Zara was also able to give evidence that she would never behave as Alain claimed she did:

- Q: *When you got in the car, do you remember the radio being on?*
- A: *No. I remember it was raining a little bit.*
- Q: *But you don’t remember any music?*
- A: *No.*

- Q: *Do you remember the noise from other people in other cars?*
- A: *I remember hearing voices outside, and people walking past in the rain, yeah.*
- Q: *Could you tell the people around about were drinking?*
- A: *Quite probably, possibly, yeah.*
- Q: *Were there people in some of the other cars that you walked past?*
- A: *I'm not too sure of that.*
- Q: *When you went back afterwards for your friend Madeleine, you found a car that you thought was his car, didn't you –*
- A: *Yes.*
- Q: *– with a couple of people in it?*
- A: *Yeah.*
- Q: *Were you aware of any other vehicles with people in it at that time?*
- A: *No.*
- Q: *Now I'm gonna suggest to you, that after you hopped in the car, you started to give him oral sex, what do you say to that?*
- A: ***I wouldn't agree with that. I've never given a man oral sex in my life. I never would want to.***

We are of the view (see further the discussion of *Jackson* below) that evidence that a complainant has **no** previous propensity, or disposition, to behave in a particular way in sexual matters should not be excluded under section 44 where it is relevant to support the complainant's evidence. We are aware that this seems counter to the previous argument about challenging the link between sexual experience and credibility – however, we consider that evidence of the absence of **any** similar sexual experience is in a different category, as opposed to evidence that the complainant would not want to have sex with the particular defendant. We also consider that in any particular trial, evidence that the complainant would not behave in this way as she never has before (to **bolster** her credibility) should not be excluded when evidence of sexual experience has been admitted to **challenge** her credibility. The fact that section 44 is a shield to protect complainants having to answer questions about their sexual history does not mean that the section should also operate to prevent admission of evidence that supports complainants' versions of events. We, therefore, agree with the admission of this evidence (discussed above) in *Vandenberg* although, given the alleged behaviour of Alain, it required Zara to have to talk about very unpleasant challenges to her sexual orientation.

In *Ahmed* the complainant, Leilani, and the defendant, Masood, were distant relatives who ended up together at a social gathering. They had both been drinking when Masood offered to take her home, calling in at his house on the way to collect something. Masood said they had consensual sex at his place, whereas Leilani alleged he raped her and forced her to have oral sex. During cross-examination she said she would never have done that willingly as it was something which she did not do:

- Q: *You've described today that you were there at some point lying on your back, is that right?*
- A: *Yes.*
- Q: *Uh huh, and you equally said that at one stage he covered your mouth, did that actually happen?*
- A: *Yes, it did.*
- Q: *You're sure about that?*
- A: *Yes, I am.*
- Q: *You described in evidence today that Mr Ahmed pushed your head down towards his penis area?*
- A: *Yes.*
- Q: *That never happened, did it?*
- A: *Yes, it did.*
- Q: *I suggest to you that you tried to suck on his penis, what do you say to that?*
- A: *Pardon, I tried to – no, I don't think so. I ain't like that.*
- Q: *I'm putting to you that you – or when you did that, he was in fact pushing your head away?*
- A: *Yes, he didn't push my head – he pushed my head down towards his penis.*

There was no obvious concern about Leilani speaking about the fact that having oral sex would be out of character – or that she had no propensity to act in that way. In *Roberts*, the defence was permitted to ask the complainant, Lara, if she had been in a sexual relationship with anyone since the break-up of her relationship with the father of her children, two year's previously. The judge viewed this as outside section 44(1) and relevant as part of the general background information (see further discussion of *Roberts* below).<sup>46</sup>

In *Kata*, a Pilot case, the Crown applied pre-trial to offer evidence about the complainant's sexual orientation as being relevant to the issue of consent, and subject to section 44(1). The judge was of the view that evidence of the complainant's sexual orientation did not engage section 44:

*The fact that the complainant is a lesbian, is to my mind, simply a statement of fact. I struggle with the concept that the fact the complainant says she is a lesbian has anything to do either directly or indirectly with her sexual experience with any person other than the defendant.*

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46 At 184.



The judge accepted the prosecution's argument that the fact that the complainant was a lesbian had relevance to whether the complainant consented – and commented that if wrong about the application of section 44(1), the evidence was still sufficiently relevant to be admitted under section 44(3). The judge also held that whether or not the complainant did in fact engage in sexual activity with persons of the same gender was “irrelevant and obviously no questions will be asked in relation to that”. However, at trial that ruling was not followed by defence counsel (see below), and there was no intervention by the trial judge or the prosecutor:

- Q: *Now I've got to put a proposition to you and you comment in any way, you feel free. It wasn't a situation where perhaps you were – got quite drunk and let yourself down and had consensual sex with him, was it?*
- A: *Um, there's no way that I would do that, um –.*
- Q: *Okay, because of your orientation that you're telling us about?*
- A: *Well, yeah, I just wouldn't – I wouldn't do that, I'm – I wouldn't just meet somebody and do that.*
- Q: *You – it wasn't a situation and you comment however you like, it wasn't a situation where – can I ask, **were you in a relationship at that point in time?***
- A: *Um, I was seeing someone, yes.*
- Q: *It wasn't a situation where you felt you had let yourself down and didn't want your partner to know at all?*
- A: *No.*

In *Sarkisian* there was also no objection to the complainant saying, during cross-examination, that she never had sex before while that drunk or in the state she was in that night:

*And I'd just like to add that not in 10 years with my husband have I ever had sex with my clothes on. I'm – the way that I see sexual intercourse with my husband is I make love. I don't make sloppy sex to my husband while, while intoxicated. My husband and I have a very loving relationship and that I found myself with half of my clothing on and half of it off, **that is never anything that I have done with my husband. He loves and respects me.***

In a third Pilot case, *Waititi*, the complainant stated in cross-examination, in response to the proposition that she had earlier been dancing with the defendant in a physical and intimate way, that she did not remember that happening and that she “wouldn't have done that”.

The Law Commission recommended clarifying the scope of section 44(1) to include evidence of a complainant's disposition in sexual matters. The Commission's conclusion on this issue was:

[3.21] In our view, the Act should be amended to make it clear that sexual disposition evidence is captured by section 44. We consider the risk of illogical reasoning about the complainant's behaviour based on evidence of their sexual disposition justifies some controls and restrictions on the admissibility of such evidence beyond the Act's general relevance test in section 7 and the general exclusion provision in section 8.

[3.22] We consider sexual disposition evidence should be admissible under section 44, subject to satisfying the heightened relevance test in section 44(3) ... [W]e consider there could be situations where sexual disposition evidence is of direct relevance to the proceedings. For example, the prosecution may wish to offer evidence of the complainant's sexual orientation to support the complainant's credibility. Alternatively, the defence may want to offer evidence of a complainant's sexual fantasies recorded in a diary or online (for example, on a dating app) to support a defence of consent or reasonable belief in consent. It follows that evidence of sexual disposition should not be completely barred.

Such a reform should cover most of the examples just discussed, although the Law Commission did not offer a definition of "disposition" as part of their proposed legislative amendments, nor is one included in the Sexual Violence Amendment Bill 2019.<sup>47</sup> Evidence considered by the Commission as falling within the scope of "sexual disposition evidence" was the recording of sexual fantasies in a personal diary or evidence of sex toys in the complainant's bedside cabinet, which the complainant used privately but not with the defendant or others. The Commission stated that such evidence "is clearly evidence of the complainant's propensity in sexual matters yet does not appear to be captured by [the scope of section 44(1) or (2)] as it might not involve other persons or lead to a relevant reputation".<sup>48</sup>

The Commission also recommended that the heightened relevance test in section 44(3) should be extended to apply to the sexual experience of the complainant with the defendant. The rationale for the reform suggests that the scope of "sexual disposition of the complainant" should cover conversations with the particular defendant about her sexual history, and therefore operate to ensure such interactions are also subject to higher scrutiny than just that of sections 7 and 8.

47 Clause 8 of the Bill.

48 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [3.9].

The Law Commission’s proposed re-drafting of section 44(1) was:<sup>49</sup>

**44 Evidence of sexual experience or sexual disposition of complainants in sexual cases**

- (1) In a sexual case, unless a Judge gives permission, no evidence can be given and no question can be put to a witness that relates directly or indirectly to–
  - (a) the sexual experience of the complainant with the defendant (except to establish the mere fact that the complainant has sexual experience with the defendant):
  - (b) the sexual experience of the complainant with any person other than the defendant:
  - (c) the sexual disposition of the complainant.

To the extent that the examples discussed relate to evidence of the complainant’s disposition in sexual matters based on her interactions with the particular defendant, this recommendation is responsive to that issue. We are not convinced, however, that sexual fantasies recorded in a diary about someone *other* than the defendant are sufficiently relevant to consent or belief in consent (unless, perhaps, they are of a particularly unusual kind).

We support extending the scope of section 44(1) but currently prefer the term “complainant’s propensity in sexual matters” to “sexual disposition of the complainant”, given the jurisprudence that already exists with regard to the scope of “propensity” evidence. It may be worth exploring different language for the purposes of this reform, accompanied by a definition.

We also suggest clarifying that “sexual experience” includes all forms of intimate interaction between the complainant and any other person or people, such as kissing, cuddling, flirting et cetera. We consider the admissibility of the complainant’s previous sexual interaction with the defendant later in this chapter,<sup>50</sup> noting here that we strongly support extending the heightened relevance test to *any* prior intimate interaction between the complainant and the defendant. In four cases in the principal research and in three Pilot cases, evidence of previous sexual conduct between the defendant and the complainant was admitted. While at the time these cases were decided section 44(3) did not apply to evidence of this kind, we are of the view that some of this evidence was admitted when not sufficiently probative (applying sections 7 and 8). Requiring a focus on a heightened relevance test will, we believe, be more likely to ensure that such evidence is appropriately scrutinised (and will be subject to a notice requirement under section 44A).

<sup>49</sup> This is essentially the same drafting as found in clause 8 of the Sexual Violence Legislation Bill 2019.

<sup>50</sup> See below at [186](#).

### Evidence that the complainant is in an intimate relationship with another person: inconsistent approaches

There were 12 cases in the principal research in which no section 44 analysis was applied to evidence that the complainant was in an intimate relationship (with another person) at the relevant time. In five other cases, a section 44 analysis **was** undertaken in relation to this type of evidence, with one judge stating that leave **is** required even to simply offer the fact that the complainant has a boyfriend (*Masters*). In the pilot study, evidence of the complainant being in a relationship with someone else at the time of the alleged offending was admitted in four cases without any reference to section 44.

Evidence about a current (or recently ended) intimate relationship was often used to support the defence theory that this is a case of regretted consensual sex, where the complainant has claimed she has been raped in order to hide an affair from her partner. Examples of this argument are set out below. However, in our view such a link lacks foundation. People may lie about having consensual sex with someone other than their partner by saying it never happened, or may seek to excuse, validate or explain their choice by saying they were drunk, upset or that it just did not mean anything. It is difficult to accept that making a complaint of rape to cover up consensual sex would be viewed as a viable option by most people. Further, the number of times this argument is raised, in the course of a trial where the issue is consent, is out of proportion even with the total occurrence of false rape complaints,<sup>51</sup> let alone with the number of false complaints based on a “cover up” that proceed to trial.<sup>52</sup> Sandra Newman concludes her report on false accusations by saying:<sup>53</sup>

51 While some research indicates that an attempt to conceal or deny a discovered infidelity can be a reason for a false complaint (see Candida L Saunders “The Truth, the Half-Truth, and Nothing Like the Truth: Reconceptualising False Allegations of Rape” (2012) 52 British Journal of Criminology 1152 at 1159), this type of falsity is very likely to be discovered well before a case proceeds to trial. See also Philip Rumney “False Allegations of Rape” (2006) 65 Cambridge Law Journal 128.

52 In Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, London, 2005), 216 complaints were classified as false (8% of all reported cases – but reduced to 3% when formulated on the basis of a probable or possible false complaint). In this Home Office study, only six of these complaints led to an arrest, and only in only two cases were charges laid. In eight of the 53 cases in which the complainant withdrew the complaint, it was categorised as a “cover up” – hiding consensual sex with another man from her husband or partner (at 47–50). The 3% figure was replicated by another study reported in Mandy Burton “How different are ‘false’ allegations of rape from false complaints of GBH?” [2013] Criminal Law Review 203 at 206. In Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Ministry of Justice, Wellington, 2019) the “no crime” categorisation decreased from 17% to 2%, which is more consistent with overseas attrition studies and is related to how disposition is recorded: at 3.

53 “What kind of person makes false rape accusations?” Quartz, 21 May 2017 <https://qz.com/980766/the-truth-about-false-rape-accusations/>

*Most of all, it should be remembered that a false accuser is a person making up a story to serve some other goal. Whether for an alibi, or revenge, it's crucial to the accuser that their story be taken seriously. For this reason, it's radically unlikely, and in practice does not happen – that a false accuser would invent a story where the issue of consent could seem ambiguous.*

In *Edwards* the complainant, Anahera, confirmed the existence of a sexual relationship with a friend, Dion (see also the discussion regarding the section 44 applications below), during her evidence in chief. It was then put to her during cross-examination that she was lying about the sex with Matthew (the defendant) being non-consensual in order to protect her relationship with Dion:

- Q: *If we start with your text [to Simon, a friend], you appear to have made it clear in that text that you didn't want Dion finding out about what you say happened in the bedroom, is that right?*
- A: *Yes.*
- Q: *And at that time in your head, you didn't think he necessarily knew about what had taken place.*
- A: *Yes, I didn't know.*
- Q: *And did you think, if he did find out, that wasn't going to help your relationship between him and you?*
- A: *No, I thought he would just stop being my friend and wouldn't believe me.*
- Q: *At that time, is it fair to say you were still worried that he might find out by some other means, through someone else?*
- A: *No, I just didn't want Simon to be the one telling him.*
- Q: *But you didn't want to be telling him either, did you?*
- A: *No, 'cos I was scared.*
- Q: *If I put it to you that you were texting Simon that morning in the way that we see on the text messaging, because if Dion later found out what happened, you could explain it in a favourable way for yourself to him, what would you say to that?*
- A: *Sorry, that question's confused me.*
- Q: *You text Simon that morning, not because any sexual activity had taken place against your consent but because you were worried about Dion finding out about what had happened in the room that you were sleeping in earlier in the night. Do you accept that?*

In this case, again without consideration of section 44, Anahera was asked in cross-examination about her boyfriend at the time of the alleged rape, without any objection:

Q: *You mentioned that you weren't in a formal relationship, if I can call it that, with Dion –*

A: Yes.

Q: *– at that time, were you in a relationship at all at that stage?*

A: No, just broke up with somebody.

Q: *And in relation to that night, how much – how much sooner was that?*

A: A week.

Q: *Didn't you tell one of the police that you'd broken up with your boyfriend following this incident?*

A: Mmm, no.

Q: *You don't recall saying it was via a phone call?*

A: No. I was dating someone that was in jail at the time.

Defence counsel in this case was attempting to develop a picture of the 18-year-old complainant as a sexually experienced young woman who would be willing to consent to sex with a 43-year-old man she had just met (a relation of a friend of hers). They were able to do so without any intervention from the Crown or the judge:

Q: *Throughout the incident, contrary to what you've told us today, you were not saying to Mr Edwards, "Stop, I don't want this".*

A: I was telling him to stop and that I didn't want it.

Q: ***You performed oral sex on him in a way that would be done if it was in the usual manner between consensual partners?***

A: No ...

Q: *You say he, Mr Edwards was forcing his penis into your mouth and you were having difficulty or couldn't get it out, **were you trying your best to sexually please him, given that you couldn't get it out –***

A: No.

Similar connections between the existence of a complainant's intimate relationship with a partner and the likelihood of her lying about consent were made in a number of other cases in the principal research, without reference to section 44. In *Tait*, a pre-trial application under section 44 to offer evidence of the complainant's (Zoë's) sexual relationships with her ex-partner and a casual sexual partner, Kris, in order to establish a foundation as to why Zoë would lie about being raped by Jesse Tait was denied. At trial however, although there is no record of any further discussion about the admissibility of the evidence, the existence of a sexual relationship between Zoë and Kris **was** put to Zoë during cross-examination:

- Q: *Was there a period when you were actually dating Kris and you actually went out with him a few times?*
- A: *I was never in a relationship with Kris, no.*
- Q: *But it was more than just friends though wasn't it? I don't want to pry too much but there was something going on between you and Kris?*
- A: *Yes.*
- Q: *Perhaps that's why those texts were sent that my friend asked you about [those] texts ... Did you send those texts perhaps because you wanted to make Kris jealous?*
- A: *Not at all.*
- Q: *Because just with respect, it didn't strike me as very plausible that a guy that you hardly knew, you'd be seeking his approval for, for Jesse staying the night with you?*
- A: *I didn't want him to have any reason to be mad that I'd have his friend under my house, under my roof, sorry.*
- Q: *But why would it matter to you if he was mad if you weren't in an informal relationship?*
- A: *I didn't want to lose a friendship.*
- Q: *Why would you lose that friendship unless there had been an edge between you and Kris?*
- A: *I don't know.*

The rationale for such a line of questioning seems to be that Zoë was planning consensual sex with Jesse in order to make Kris jealous. However, it is difficult to establish an acceptable basis for such a claim, and therefore the relevance of the evidence that Zoë and Kris had previously had sex. In any event, this was evidence that, regardless of purpose, should have (also) been subject to a section 44 analysis.

In four cases, evidence that the complainant had a boyfriend, was married or lived with a partner (and child or children) was offered when it had no obvious relevance to the issues or background narrative – presumably leaving it up to the jurors to make what they would of that information.<sup>54</sup>

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<sup>54</sup> In *Jackson*, evidence that the complainant originally said to the police her first thought was that her boyfriend was in bed with her (although he was overseas at the time) was offered by the defence, although this confused thought would not have undermined her claim that the sex with the defendant was not consensual, it was relied on to support a submission that she behaved as though consenting to sex with her boyfriend, giving the defendant reasonable grounds to believe she was consenting to have sex with him.

In other cases, the evidence was more clearly used to suggest poor judgement and giving a defendant mixed messages – see for example the following interchange in *Ahmed*:

- Q: *Mr Ahmed will give evidence that the two of you discussed the issue of a relationship, what do you say about that?*
- A: *I don't think so, but I was already in a relationship with somebody else.*
- Q: *So, you're in a relationship with another person at the time, that's right?*
- A: *Yes.*
- Q: *And I'm suggesting to you that you've then willingly gone to Mr Ahmed's house, what do you say about that?*
- A: *What do I say about that? We only s'posed to be going there to get a ... so we can actually go back. I wasn't actually planning to stay there.*
- Q: *But I'm suggesting to you that you willingly went there and willingly had sex with him?*
- A: *No, I don't think so.*

In this case, the defence theory of covering up regretted sex was taken further by the suggestion that Leilani had made a false claim of rape because Masood was not willing to protect her from her partner's anger if he were to find out:

- Q: *See Mr Ahmed will give evidence that you had this discussion and that you asked him what would he do if your partner gave you a hiding.*
- A: *I did not ask him about any of that.*
- Q: *It was, Mr Ahmed will give evidence that, that it's a situation where you were, or you told him that you were worried?*
- A: *I did not say anything like that at all.*
- Q: *And is it the situation that when Mr Ahmed didn't agree to immediately be in a relationship and protect you that you got all upset about it?*
- A: *I'm not in a, I'm not worried about anything else, but I'm, you know, we didn't even talk or anything about any of those things at all.*
- Q: *It's not the situation that you wanted him to say, you know, he'll protect you and make sure you'll be okay in relation to your partner?*
- A: *Oh, I'll be all right by myself, I can protect my own self.*
- Q: *And you're saying that you, you didn't want to be in a relationship with Mr Ahmed is that what you're saying?*
- A: *Yeah, well, I'm not going to be in a relationship with anybody but my children's father.*



Traversing current and past relationships in order to develop the theory as to why the complainant is lying also has the effect of inviting (negative) judgements about a complainant's lifestyle choices, and the likelihood that the event (whether sex or rape), would have little real impact on the complainant's well-being. In *Buchner*, for example, the complainant Farida and the defendant Anthony had known each other for some time and were together drinking with some mutual friends that evening. Anthony accompanied Farida home when she became upset and intoxicated. Farida had previously offered him a place to stay for the night and had invited others of her group of friends to come to her place too. The defence theory of the case was that the sex was consensual and Farida had lied about being raped to get back "onside" with her ex-boyfriend (Milton) who was now interested in a friend of hers (Natalie). The prosecutor assisted with the evidential basis for this argument by asking the questions about Farida's recent relationships in examination-in-chief:

- Q: *Okay. Have you got friends in common, you and Anthony?*
- A: *Yep, many mutual friends.*
- Q: *Right. And were you seeing anyone at the time in a boyfriend/girlfriend relationship?*
- A: *Not at the time but it was a recent break-up with someone.*
- Q: *Okay. But in terms of when – well you met Anthony about three years ago?*
- A: *Yep.*
- Q: *Okay. From that point where you met him, were you going out with anyone at that stage?*
- A: *Um, I was in a steady relationship with someone for four years and then we had called it off.*
- Q: *And who was that?*
- A: *Um, Garry.*
- Q: *And did you at any stage have a relationship with any of Anthony's close friends?*
- A: *Yes, um, I got involved in a relationship with his best friend, Milton.*
- Q: *And how long did you go out with him for?*
- A: *Um, just under a year.*
- Q: *All right. So, you've said that on this night ... you weren't going out with anyone? You weren't in a relationship with anyone?*
- A: *No.*
- Q: *Okay. When had you broken up with Milton?*
- A: *Just over a week before.*

While there is some relevance in establishing how the complainant and defendant knew each other, there seems little relevance in the evidence about Farida's relationship with Garry, or even how long she had been single. Some explanation could have been given about what had made her upset that evening, but if that involved the break-up of an intimate relationship and was related to why she may have consented to having sex with Anthony, section 44 should have been considered. During cross-examination, it was put to Farida that what happened had been "embellished" by her in order to improve her relationship with Milton:

- Q: *Isn't what's happened here that, Ms Nasser, that sure enough you would have got a surprise that Mr Buchner made the approach he did to you but what's happened is that you've embellished the story, you know what I mean, made it sound more than it actually was?*
- A: *No, I wouldn't go through all of this and all this trauma just to ...*
- Q: *And this has all happened in an effort to try and get Milton back onside with you?*
- A: *It was not for that.*
- Q: *Because it didn't actually happen, did it?*
- A: *No, it did.*
- Q: *No, I mean, sorry, I'll rephrase the question. Milton didn't actually get back onside with you as a result of this?*
- A: *But that didn't matter.*
- Q: *No, I just asked you, that didn't happen did it?*
- A: *No.*

Given that evidence of the recent ending of an intimate relationship is offered for the purpose of directly relying on the "twin myths" (sexually active women are more likely to consent to sex and are more likely to lie about consenting), which section 44 was designed to limit, it is unfortunate that no (documented) consideration of the relevance and probative value of this evidence was undertaken before or during this trial. In our view, the relevance of information about the complainant's relationship status must be carefully considered in each situation and should be subject to a section 44 analysis, especially when the purpose of offering the evidence is to challenge the complainant's credibility. We continue to question whether any empirical research exists to support the argument that women falsely complain of rape in order to cover up what is a consensual sexual relationship. In this regard we prefer the analysis of the judge's pre-trial ruling in *Tait*:

*The Crown, however, submit that the first ground is not only speculative, it is illogical. The complainant was in a casual, occasional sexual relationship with [Kris]. [Ricky] was an ex-partner with whom she apparently had sex sometimes. Neither of them could be classified as an exclusive relationship, and it is clear that [Zoë] was willing to have sexual intercourse with both of these men without*

*feeling the need to claim that each had raped her so as not to upset a relationship with the other, and it is submitted that it is difficult to see why only the accused would be subject to that kind of treatment by the complainant ...*

*I do not think it appropriate to allow leave in a situation where, in my view, the jury would get irrelevantly side-tracked by her having had consensual sex with two others. There is no real evidential foundation, in my view, for what is really speculative reasoning as to why [Zoë] might be making up an allegation of rape.*

Despite this ruling, the defence still asked Zoë about the nature of her relationship with Kris and speculated (in closing) that she was lying about the sex with Jesse in order to make Kris jealous:

*I submit to you that Zoë was trying to make Kris jealous, but **at the same time the next morning she didn't want Kris to know about sex taking place.** That might not seem so logical but perhaps the thought processes weren't so logical just after midnight either. She'd sent a text and she had to try and keep a secret.*

In our view the words in bold infer that Zoë had a reason for lying – which in the pre-trial ruling the judge had held was lacking in evidential foundation and “speculative”. The trial judge however summed up on the point in this way:

*And the evidence overall seemed to be that she wasn't all that interested in having Kris know that she had this involvement with the accused so the defence puts it to you that both these parties had an interest in keeping the matter a secret and that they didn't want, in particular Rowena [Jesse Tait's girlfriend] and Kris, to be upset about the fact that this had happened between them.*

Based on the case file material we had access to, there did not seem to be further evidence suggesting Zoë had a motive to lie based on her other sexual relationships, but presumably such evidence must have been available to allow the defence argument to be made. While it may be permissible for counsel to suggest such a motive for a false complaint, this approach provides an opportunity for the judge when summing up to advise the jury that false complaints are uncommon and to look for other evidence to confirm this theory of the case.<sup>55</sup>

The remaining four cases in the principal research (*Young*, *Perez*, *Masters* and *Yamada*), in which a section 44 analysis was applied to determine the admissibility of evidence of the complainant being in an intimate relationship with another person, are discussed in the next section.

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55 See further Chapter Nine at 425; Janine Benedet “Judicial Misconduct in the Sexual Assault Trial” (2019) 52 University of British Columbia Law Review 1 at 54.

Similar arguments about the relevance of a complainant's sexual relationship with another person to assessments of her credibility were made in the Pilot cases. It occurred during cross-examination in *Kata*, despite such information being ruled inadmissible pre-trial.<sup>56</sup> In *Junn*, the complainant Charnze Vete was asked about phoning her ex-boyfriend when she arrived home after the alleged rape. Evidence of the fact that she had a previous sexual relationship and that she might have been attention seeking by making this call to her ex-boyfriend (suggesting falsity) was not the subject of any judicial consideration.

In *Sarkisian* it was also put to the complainant that she lied about being raped, to protect her marriage, but she was permitted to respond to that claim more fully in re-examination (the only example of this level of response to such a challenge in the total case set of 40 trials):

- Q: *Now the question's been put to you that something had happened between you and Mr Sarkisian and you knew you were in trouble and because of that you've made up these allegations. And what's your response to that?*
- A: *Not at all. I know in myself I would never put myself in a position to allow someone to violate me like that. And I'm not, I'm not I'm not a person that sleeps around on my husband. My goodness, I have worked, I travelled a lot for my job. I travelled for weeks at a time and if I want to do something like that, I could have done that long before being in such an unconscious state. I'm not that kind of woman. I love my husband entirely and I would never, the thought of cheating on somebody, for me loyalty and integrity is the biggest value of mine and I would never do that to me or him or anybody that I love.*

In the Pilot case of *Satae* the judge explicitly ruled that section 44 does not apply to evidence of the (mere) fact that the complainant had a boyfriend at the time:

- DEFENCE: *We just thought we'd just touch base with Your Honour before we empanel sir because as you know the pre-trial was before Judge [ ]. We've tidied up most things, in fact everything bar one narrow point and that is the section 44A and I basically agree with the Crown.*
- JUDGE: *Well it's not section 44.*
- DEFENCE: *Well, we had this debate in my office. Logically, and I just, as a matter of interest sir, ran into the library. My view is that to say "I have a partner", assumes it's a sexual relationship.*
- JUDGE: *No. Section 44 is not engaged.*
- DEFENCE: *Yeah, well, that's my view.*
- JUDGE: *Provided of course, it goes no further than the fact she has a partner or a boyfriend.*

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<sup>56</sup> See 146 above.

**DEFENCE:** *And the only reason I'm putting it in sir, is the change of heart argument.*

**JUDGE:** *Yeah, of course.*

**DEFENCE:** *Nothing else.*

**JUDGE:** *Well, as the Crown say, that is a central issue so far as the defence is concerned, but it is not to go beyond that.*

A complainant's reference to an existing (sexual) relationship as an explanation to the defendant (or in the course of the trial) as to why she would not and did not consent to having sex with the defendant does of course have relevance, at least as part of the events in issue. However, while this expressed rationale may also be code for disinterest in the defendant, the fact that the complainant has had sex (or kissed) someone else despite being in a relationship, is often then admitted as evidence which is relevant to the complainant's credibility (not always involving consideration of section 44). While this may well be viewed as evidence that contradicts the reason the complainant gave to the defendant for not having sex with him (and therefore any sex was not consensual), the contrary purpose for admitting such evidence is impermissible. That is, if the complainant had sex with another person while in a relationship, that does not make it more likely that she consented to having sex with the defendant. The risk of admitting such evidence for the limited purpose of credibility is that the jury will use it for an improper purpose (consent), and, in our view, even the use of carefully crafted jury directions may not overcome the clear policy rationale of section 44 that evidence of prior sexual experience is inadmissible for the purpose of challenging a complainant's credibility.<sup>57</sup>

### Summary on the admission of evidence treated as falling outside section 44(1)

In the cases in the principal research, as well as in the pilot study, there were inconsistencies regarding what evidence is captured by section 44(1). The consequence of that inconsistency is that the same evidence was subject to a heightened relevance requirement in some cases and not in others. The scope of section 44(1) needs to be clarified, ideally by changes to the Sexual Violence Legislation Bill 2019, as part of the Select Committee process.

Regardless of the issue as to the scope of section 44(1), evidence about the complainant's disposition or propensity in sexual matters not currently covered by section 44(1) must still, however, be sufficiently relevant to an issue in the case. In order for such evidence to be admissible it must have a "tendency to prove or disprove anything that is of consequence

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<sup>57</sup> It should be clear from this discussion that we are troubled by the decision of the Court of Appeal in *Pegler v R* [2015] NZCA 260 (see also Scott Optican "Evidence" [2015] NZ Law Review 473 at 512–513). We do agree with the decision of the Court in *Schollum v R* [2019] NZCA 69 (see the discussion at *n* 83), but argue that the outcome should have been the same even if the complainant's reason for not consenting to have sex with the defendant was that she had a boyfriend, rather than she was not interested in him except as a friend.

to the determination of the proceeding”.<sup>58</sup> In both studies evidence was admitted that we consider was not of sufficient relevance, and certainly would not have been admissible under section 44(3). Further, a particular type of evidence – that is, information about the complainant being in an intimate relationship with someone else at the time of the alleged rape, for purpose of suggesting a motive to lie – was sometimes viewed as within section 44(1), sometimes viewed as outside it, was sometimes admitted and sometimes excluded. This type of inconsistency is also undesirable.

While on occasion the judge saw no harm in the defence offering the evidence of the complainant’s relationship status merely to establish the existence of a relationship, it is difficult to see the relevance of that fact of itself. Such evidence may have relevance to explain physical evidence or perhaps why the complainant told that person first, but the purpose of admission should be clearly apparent to the jury. We are also of the view that a claim that the complaint is false because the complainant was in an intimate relationship at the time of the alleged rape needs to be supported by more than just the fact of the relationship in order for it to be sufficiently relevant. We consider that evidence of this nature must be clearly caught by the proposed legislative amendment and be subject to section 44(3). Appellate guidance on the admissibility of evidence of this nature would also be of assistance to trial judges.

### ***Application of section 44(3): analysis of the cases***

Evidence which falls within section 44(1) is only admissible if the judge is satisfied it passes the heightened relevance test in section 44(3). Evidence of a complainant’s reputation in sexual matters is presumptively barred by section 44(2). Although argument was made by the Crown in various cases that the evidence at issue fell within section 44(2) (such as *Harete*, discussed below), in no cases in the principal research was the evidence stated to be excluded on this basis. However, in some cases we consider that the **extent** of the evidence concerning the complainant’s previous relationships or sexual interaction with others (*Buchner*, *Schuette* and *Roberts*, in particular) had the effect of creating a reputation for the complainant, and is concerning in this regard.

In 15 of the 30 cases in the principal research, a section 44(3) analysis was applied to resolve the admissibility of this evidence. In eight cases, the admissibility decision was made pre-trial, in seven cases it was made, or re-evaluated and re-argued (in three), during the course of the trial. In one case, *Schuette*, the decision to exclude was successfully appealed pre-trial, and in *Edwards* the decision to exclude was unsuccessfully appealed post-conviction.

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<sup>58</sup> Section 7 of the Evidence Act 2006.

In three of the 10 Pilot cases, a section 44(3) analysis was applied to the evidence being offered, although in a further case, *Lowrie*, the judge ruled section 44(1) would not be engaged if the evidence at issue was offered by the examining MEDSAC doctor. In only one case, *Junn*, was the admissibility decision made pre-trial. In the other two cases, the application was made during the course of the complainants' cross-examination and the notice requirement in section 44A was referred to and waived (*Sarkisian* and *Waititi*). There were no appeals of any section 44 decisions made in any of the Pilot cases.

The evidence that was the subject of the application during the trial in *Waititi* is set out above.<sup>59</sup> The desirability of cross-examination as to the inconsistencies about the complainant's references to the presence of a condom would have been apparent pre-trial. In *Lowrie* we accept that the need for an admissibility decision only occurred as a consequence of the complainant's evidence at trial. In *Sarkisian*, however, the evidence at issue was a matter recorded in the MEDSAC doctor's notes and disclosed pre-trial. The judge noted this, but heard the application at trial:

*Had this application been made in accordance with section 44A, I would have declined it. However, the exigencies of the trial were such that there was no opposition from the Crown to the hearing of the application during cross-examination of the complainant and I heard it.*

In the *Evaluation of the Sexual Violence Court Pilot*,<sup>60</sup> one stakeholder noted, which is consistent with these findings, pre-trial applications concerning the admissibility of sexual history evidence are not made in all cases, but rather at trial. Consequently, the complainant is not prepared for the possibility of needing to respond to questions about her sexual experience, which can be traumatising. Further, the Crown is less likely to be well-prepared to make submissions on admissibility and there are very limited options for the Crown to appeal the admission of such evidence post-verdict.

As previously discussed, the evidence at issue in some of the section 44 decisions was held to be outside the scope of section 44(1), or there was simply no consideration of the relevance of the evidence or what should be the applicable specific admissibility rule.<sup>61</sup> One type of this sort of evidence was of the complainant flirting with another person earlier on the same night (see *Moss* and *Wilde* as compared to *Yamada*). The main other category of evidence which was not subject to a section 44 analysis in most cases concerned the complainant's relationship status. In four cases, however, a decision based on section 44 was made with

59 At 139.

60 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 94.

61 We particularly note the lack of (recorded) pre-trial consideration of the relevance of evidence of alleged "threesomes" in *Cropp* and *Depak*.

regard to such evidence. A decision to exclude the evidence, offered for the purpose of establishing a motive to lie, was made in *Tait* (see above),<sup>62</sup> and *Young* (see below),<sup>63</sup> while the judge in two other cases held that such evidence was admissible.

The following discussion of the section 44 decisions is grouped according to the nature of the evidence and the purpose for which it is being offered. The identification of purpose is essential to consideration of relevance and therefore admissibility,<sup>64</sup> and is of particular significance when applying a heightened relevance test to evidence of a complainant's sexual experience:<sup>65</sup>

*Care must be taken if leave is granted under section 44 in identifying the issues to which the evidence is admissible. The evidence may be relevant to one issue but not to another, for example, whether a defendant's belief in consent was reasonably grounded.*

In the context of this adult rape case research, the principal two issues at trial were consent and credibility. Given that these issues attract reliance on the "twin myths" that admissibility rules like section 44 were enacted to disrupt, it is essential to ensure that decisions about the relevance of evidence to these principal issues do not reinforce mythology or contestable beliefs about the links between, in particular, sexuality and credibility. The discussion of the section 44 decisions will, therefore, include identification of the likely purpose of offering evidence concerning the complainant's sexual experience (even if that has not been clearly articulated in the decision) and will provide critical commentary on the decisions, with reference to the premise(s) or assumptions supporting admission.

While in a number of these contexts evidence of the complainant's sexual experience is offered on the grounds that it is relevant to an assessment of the complainant's credibility, we believe that admission on such a basis is often contrary to the purpose of section 44. Recently, in *Marsters v R*, the Court of Appeal stated that the application of the rule in section 44 is somewhat different in cases concerning children, so that "evidence of previous complaints in cases involving children may be admitted **if it is of material assistance to assess the complainant's credibility**, particularly in cases where the evidence of other complaints made by the child has striking similarity to the allegation against the defendant".<sup>66</sup> In our view, this indicates that this approach is the exception and that in other contexts evidence of prior sexual experience offered to challenge credibility is presumptively inadmissible.

62 At 152.

63 At 164.

64 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [28].

65 Hon Justice Mathew Downs and Hon Justice Mark O'Regan "Evidence Update" in *Criminal Law Symposium* (NZLS CLE Ltd, Wellington, 2016) 3 at 7.

66 *Marsters v R* [2019] NZCA 140 at [19].



We also note the difficulty faced by the prosecution in seeking to counter (often relentless) attacks on a complainant's credibility – as discussed below in relation to a number of cases in which section 44 has been considered, but also more generally. In *R v J* (CA 693/2017), for example, the Court of Appeal found that the prosecutor's questions in examination-in-chief allowed the complainant to make a statement that showed her in a good light, and amounted to evidence that unfairly bolstered her credibility.<sup>67</sup> The Evidence Act 2006 does not prevent the admission of evidence that bolsters a witness' credibility, as long as it is admissible under sections 7 and 8. Such evidence, which is responsive to an attack on credibility, seems to us to have sufficient probative value and is not of itself "unfair". We consider this issue further in Chapter Six.

### **Evidence of the complainant's relationship with another person for the purpose of establishing a motive to lie or that the complainant is lying (to challenge credibility)**

In *Perez* the judge ruled that evidence that the complainant, Mary De Souza, was in an intimate relationship with Keith (the man she chose to contact for help after the alleged rape) was admissible. In the judge's view, evidence of such a relationship had sufficient relevance (applying section 44(3)) for the purpose of exposing a motive for Mary to lie (about consent):

*Ms De Souza has not been challenged at this stage about why she may fabricate an allegation against you. However, exploring this particular area, namely the nature of her relationship with Keith, may yield one. That is the opportunity that you wish to take. If there is more to the relationship than an innocent friendship you may feel that that does provide a basis for arguing before the jury that she has a motive to fabricate an allegation against you. That in turn would go directly to her credibility and the truth of her allegation. The Crown accepts that it would be questioning that is relevant to facts in issue.*

In our view, without evidence to suggest Mary was attempting to cover up a consensual sexual relationship with the defendant, the mere fact of an existing and ongoing intimate relationship with another person does not have sufficient probative value to establish a lack of credibility, or lying about the fact of consent.<sup>68</sup> In *Yamada*, the fact that the complainant had reconciled with her previous partner, and had sex with him close in time to the alleged rape, was also offered to establish a motive to lie:

*The defendant's position is that the allegation of rape only arose when the complainant had reconciled with her partner and was only characterised by her as rape in order to protect the relationship with her partner. The allegation of rape was first made on [date]. It is the defence case that this was after the reconciliation had occurred.*

<sup>67</sup> *R v J* (CA 693/2017) [2018] NZCA 343 at [58].

<sup>68</sup> See *Schollum v R* [2019] NZCA 69, discussed at [n 83](#).

The complainant, Grace, accepted in her police interview that she had, by then, reconciled with her ex-partner. The medical examination report included evidence that she had had sexual intercourse with him the day after the alleged rape (16 May).<sup>69</sup> In the pre-trial decision, the judge held that the determining inquiry was if the complainant accepted that she reconciled with her partner on 16 May. If so, the judge said, “whether or not she resumed a sexual relationship with her partner is of no relevance and the threshold in section 44 would not be reached.” We agree. However, the judge went on to say:

*If the complainant does not accept that she reconciled with her partner on 16 May then the evidence in the medical examination records becomes relevant to establish that the reconciliation did occur. In that event, it may be that the threshold might be reached.*

At the trial the complainant did not accept that she had reconciled with her ex-partner by 16 May (in fact saying she does not remember when they reconciled, but that she did go to his house the day after the alleged rape). Consequently, the defence was allowed to challenge her credibility by reference to what Grace told the doctor concerning when she last had sex, and with whom. Although this allowed the jury to speculate whether someone who had been raped would have consensual sex so soon afterwards (suggesting the sex with the defendant was consensual), the risk of this illegitimate reasoning<sup>70</sup> was not considered when the judge permitted the cross-examination to proceed for the purposes of attacking Grace’s credibility. As such, in our view, the section 44(3) threshold for admissibility was not met.

In *Young*, the defendant Oscar and the complainant Erin were at the party of a mutual friend, Steven. Erin was there with her long-term partner Anthony, who became very drunk and needed to be taken home. Oscar offered to drive them both to their house so Erin could put Anthony to bed, and later also took Erin home alone. Erin said that Oscar stopped the car on the way to her house and raped her. While originally denying anything happened, his response to the DNA results was to say the sex was consensual and that Erin was lying about the events to hide her affair with Steven from Anthony. The pre-trial section 44 application concerned evidence that two weeks *after* the alleged rape, but some months before Erin told Anthony and the police that Oscar had raped her, she and Steven had had sex.<sup>71</sup>

*The defence theory was that evidence of that relationship, and in particular that event [one off consensual sex], was relevant because it tended to show that the allegation of rape had been made up in collusion between Erin and Steven to cover up and divert attention away from their relationship which had, subsequent to the alleged rape, developed into an affair.*

69 This is not the actual date of the alleged offending.

70 See Court of Appeal authority on this point listed at [n 73](#) and the discussion of *Tait* below at [166](#).

71 Extract taken from the pre-trial appeal.

*[The trial judge] agreed that was not a satisfactory basis for permission to be given under section 44. Given the policy that informs section 44, and the many decisions confirming the high threshold set by section 44(3) in light of that policy, the Judge was right in reaching that conclusion. There is no evidential basis to support the theory of an affair, and speculation as to the possibility of one, lacks cogency. The theory of collusion and falsification is also at odds with the text exchange between Erin and Steven on the evening in question, particularly her request for help, and the fact that Erin reported the rape to Steven a week before the one occasion of sexual intercourse.*

We agree with the decision and the reasons given with regard to this evidence. However, in contravention of the ruling, defence counsel closed by inviting the jury to speculate on the nature of the relationship between Erin and Steven, which the judge responded to in the summing-up.<sup>72</sup> The jury was unable to reach a verdict and there was a re-trial. Evidence of the sexual relationship between Steven and Erin was again excluded. Oscar Young was convicted of rape and sentenced to seven years imprisonment.

#### **Evidence of the complainant having consensual sex with another person close in time to the alleged rape (for the purpose of establishing consent or to challenge credibility)**

In a number of recent cases, the defendant has sought to question the complainant about the fact that she had consensual sex with another person shortly after the alleged rape. Whether this is argued as relevant to consent or relevant to assessing whether the allegation is false, it has been held that the evidence is inadmissible under section 44(3):<sup>73</sup>

*People react to their, sometimes, bad experiences in different ways, and the idea that [the complainant] would be in such a bad state that having sex with her partner soon after would be unthinkable is not a reasonable inference.*

72 “Counsel for the defendant in this trial did not have my permission, as the judge in this trial, to raise directly or indirectly anything relating to any sexual experience or reputation [Erin Blackman] might have had with any person other than the defendant. He should not have referred to this law in his closing submission to you. He was wrong to do so. By doing so, he has effectively suggested to you that you can speculate about what [Erin Blackman’s] sexual experience with others might be, and her reputation. You must not do that. You must not speculate over any matter in this trial. You must only look at the evidence properly presented in the trial ... There are two things you need to remember. One, the law in section 44 of the Evidence Act was wrongly raised in his closing address by defence counsel and you must not consider or speculate upon that submission by him. Two, the error relating to the raising of the law in section 44 was the error of defence counsel and must not be held against the defendant. You must consider all the evidence properly presented in this trial and find the defendant guilty or not guilty accordingly.”

73 *Hall v R* [2017] NZHC 1489 at [29]. See also *Singh v R* [2016] NZCA 552 at [20] and *Wallace v R* [2018] NZCA 2 at [14].

In a pre-trial decision in *Tait* the judge came to a similar conclusion regarding the admissibility of the evidence that the complainant, Zoë, had consensual sex with two other men in the two days after the alleged rape. The defence argued that someone who had been raped would be unlikely to behave in such a way and so the evidence was said to challenge her credibility. The judge ruled that the evidence was inadmissible:

*The [defence argument] seems to rely upon a proposition that no woman who has been raped would then engage in sexual activity a relatively short time afterwards, and that is simply an assertion which the Crown suggest ... is made without evidence ... I am not prepared to grant leave in a situation such as this. In my view the reasoning is illogical and flawed, and at the end of the day there is a real risk of character blackening in a case such as this ... [I]n my view, it is illogical to suggest that there is a time frame within which a woman can consent to a sexual relationship after having been allegedly raped.*

We agree with this decision and the judge's reasons.

In *Schuetz*, the judge in a pre-trial ruling determined that evidence of a text message sent by the complainant, Ianthe, to her boyfriend earlier in the evening was inadmissible:

*The accused [Crispin Schuetz] seeks to be able to cross-examine the complainant as to the text exchange with an unidentified male which he submits indicated a desire on her part to engage in sexual intercourse with this unidentified male or if he did not want to, then she could tell him so, in order that she could text someone else who did want to engage in sexual intercourse with her ...*

*I am of the view that the text exchange has to be seen in context. I accept the Crown's submission that the texts could be characterised as "banter or bluff" between friends which is not intended to be taken seriously. It is of significance that the complainant did not text anyone else when the unidentified recipient declined her proposal, nor did she invite the accused into her bedroom. Furthermore, there is no evidence the accused was aware of the content of the texts and therefore it is not of direct relevance to his defence of consent or reasonable belief in consent.*

Crispin had come to the house the complainant lived in and they met during the course of the evening, while drinking with mutual friends. Ianthe gave evidence that she had become heavily intoxicated and was put to bed, waking later to find Crispin raping her. Crispin said she consented. The decision to exclude the evidence was successfully appealed pre-trial. The Court of Appeal held that the text interchange was admissible in the wider context of the trial, in which the jury would hear that Ianthe was interrupted by Crispin when undertaking sexual activity with another man at the party. Following this event, Ianthe sent the texts to her boyfriend. The Court said:

- [9] In the somewhat unusual circumstances of the case we consider the defence should be allowed to put the text message to the complainant. We are satisfied that the text message has strong probative value to the defence. We are influenced in this by its close proximity to the alleged offending, and by the fact that it comes between the first thwarted incident with the other man and the alleged offending. All this sequence occurs over a period of an hour and a half preceding the alleged rape so has direct relevance to lanthe's state of mind at the time the alleged rape occurred. What the jury make of the proposition is of course a matter for them, but given that the Crown is leading the evidence of the first man, it seems correct to also allow this evidence to be put.
- [10] In our judgment the existence of the text message is of such direct relevance to the issue of consent that it would be contrary to the interests of justice to exclude it. The message is of course irrelevant to the separate issue of [Crispin Schuette's] state of mind. He did not know of the text and could not argue that it affected his belief that [lanthe] was consenting.

The inference to be drawn in these circumstances is that lanthe was “up for anything” and with anyone, that evening. While it may well be fair to allow the jury to hear all of the evidence regarding her behaviour on the evening, her level of intoxication at the time of the two previous events was not the same as when she was in bed and Crispin entered her room without invitation. In this context, jury directions concerning her ability to consent **at that time** would have been critical. We are of the view, with respect, that the admissibility of the text messages does not have the level of probative value suggested by the Court of Appeal, unless accompanied by appropriate directions on consent. While appreciating the Court's comments that these were “somewhat unusual” circumstances, there is a risk that if such reasoning is applied more widely, once a young woman sexually propositions someone on the same night of the alleged sexual offending, she can be viewed as available to all.

The Court of Appeal did make a general comment about the impermissible link between an interest in sex with someone else and consent to having sex with the defendant:

- [4] Normally a general statement by a woman to a person other than the accused that she was interested in having sex will not be admissible to support an allegation of consent on the particular occasion. There is an insufficient link for the statement to have much by way of probative value, and there are the dangers of blackening character which in part informed the enactment of provisions such as section 44.

However, the key aspect of this statement that seemingly gives the expression of “previous interest” its probative value is the close proximity in time to the alleged offending. In our view, the existence of consent is still to be considered on every specific occasion, regardless of how close in time it is to earlier consensual sex (or expressions of sexual interest). While the jury may well have thought it less likely the complainant would have consented to having sex with a person she had just met on the night without learning of the text messages to her boyfriend, an important aspect of the wider context is that at the time of the alleged offending she was asleep/unconscious in her bedroom.<sup>74</sup>

### **Evidence of the complainant previously reporting similar sexual violence (offered to challenge credibility)**

In *Edwards*, decided before the Supreme Court decision in *Best v R*,<sup>75</sup> in a pre-trial ruling which was reviewed during the trial to similar effect (and upheld post-conviction), the judge considered the admissibility of evidence concerning a previous complaint. The complainant, Anahera, had previously reported an alleged rape to the police (two years prior to the events giving rise to the proceedings), who had decided not to prosecute based on the (insufficient) evidence available. The judge, determining it was not a false complaint and that the issue at trial was consent, determined that section 44 was engaged and the evidence was inadmissible:

*In this case, the jury will have to embark on a fact specific enquiry as to whether on a particular occasion the complainant did give consent or if she did not, or whether the accused formed a reasonable and honest belief – albeit a mistaken belief in such consent. How she has behaved with another person – in the absence of something highly unusual – is unlikely to assist the jury. The fact that someone else with whom she had sex formed a reasonable belief in consent in the circumstances as presented to him, cannot possibly assist the accused.*

We agree that a previous complaint of similar offending, whether true or false, is irrelevant to the likelihood of consent in the particular case. Evidence of a previous false complaint is however relevant to the complainant’s credibility, or even their veracity, depending on the nature, context and timing of the falsity.

In *Edwards* the judge ruled that evidence of the complainant’s knowledge of police investigatory procedures was admissible. Presumably evidence of her knowledge was viewed as relevant to her credibility because it allowed questioning of her reason for showering given the desirability of DNA evidence (Anahera had undertaken a forensic medical examination following the first complaint), as well as questioning about the nature of the text messages Anahera sent (such information was gathered after the first complaint).

<sup>74</sup> For discussion of the directions on consent in this case see Chapter Seven at [275](#).

<sup>75</sup> *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

A similar ruling was made during the complainant's evidence in *Ihaka*:

*I am just recording for the moment my ruling that [defence counsel] may cross-examine on the witness' knowledge of the complaint procedure even if that requires him to refer to earlier prosecution for sexual offending against the witness.*

Our concern about both these decisions is the extent to which a jury may speculate as to the facts (or outcome) of the previous prosecution or, in *Edwards*, the reasons that the complainant was familiar with police investigatory practices. In our view, many people have sufficient understanding of forensic inquiries without having been a victim or an offender – that may or may not mean they will behave in a particular way if they are the victim of offending. Further, even if the complainant's knowledge of investigative practices is relevant at trial (only as to credibility it is suggested), a simple question as to the **fact** of that knowledge, without a question as to the reason for the complainant having that knowledge, should be sufficient and reduces the risk of illegitimate jury speculation or reasoning.

The final part of the judge's pre-trial decision in *Edwards* concerned what may have transpired between Anahera and her boyfriend Dion on the night of the alleged offending. According to the defendant, Matthew, he suggested that he and Dion have a "threesome" with the complainant – that Dion should start, and Matthew would join later. The defence argument was that evidence of sexual intercourse between Anahera and Dion would therefore be relevant to the defendant's belief in consent (on the basis they were acting on his suggestion). The judge ruled:

*If there was evidence that the complainant and [Dion] had sexual intercourse on the evening, it adds weight to the accused's account of events and would obviously be relevant. However, in the absence of evidence suggesting that there had been such activity between the complainant and [Dion] on the night in question, then any acts of sexual intercourse between these two would be irrelevant to the jury's enquiries.*

Subsequent to receiving DNA results that Dion's semen was present in the swabs taken from the complainant, the prosecutor sought permission (which was granted, unopposed) "to lead from the complainant at trial that the night before the offending ... she had consensual sexual intercourse with [Dion]". However, no purpose for offering the evidence was given, and consequently no grounds for admission were stated. In our view, the fact that Dion had sex with the complainant was irrelevant to the issue of whether Anahera would have consented to have sex with Matthew, or whether he believed on reasonable grounds that she did. The fact of his **proposal** that there should be a threesome does not add probative weight to this evidence, absent supporting evidence from Dion or the complainant that they were acting in furtherance of a plan to engage in a threesome.<sup>76</sup>

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76 We did not have access to Dion's evidence, but the complainant gave evidence that she was unaware of the suggestion of a threesome.

### Evidence of the complainant having had previous similar consensual sex with another person (for the purpose of establishing consent or to challenge credibility)

In *B (SC12/2013) v R* William Young J stated:<sup>77</sup>

*Generally, and most importantly, the complainant's supposed interest in having sex on [another] occasion cannot logically provide any support for the theory that she consented to have sex with the appellant on the night in question.*

In *R v Singh* the Court of Appeal noted that it has been “pointed out in a legion of cases” that drawing a connection between consent on a previous occasion with another person and consent given to the defendant “is illogical and would therefore be impermissible for a jury”.<sup>78</sup>

Concluding their assessment of the recent case law on section 44 in 2016, Justices Mathew Downs and Mark O'Regan concluded:<sup>79</sup>

*It is not permissible to reason that because the complainant consented to sexual activity with X on a particular occasion, she was therefore likely to have consented to sexual activity with D. This type of reasoning is illogical.*

With regard to the relevance of previous sexual experience to the issue of complainant credibility, the Court of Appeal in *W (CA537/2012) v R* stated that the jury should not be invited to “draw the inference that [the complainant] is promiscuous and so unworthy of belief, which is the very risk that section 44 is intended to control”.<sup>80</sup>

In three cases in the principal research, evidence of the complainant's sexual experience with another person was sought to be admitted, primarily to challenge aspects of the complainant's evidence.

In *Elliot* the complainant, Janey, had met the defendant, Cameron, at the home of a mutual friend while her partner was away. They had consensual sex some days later, but the next morning Janey told Cameron she did not want to continue to have sex with him and regretted that she had done so. After Cameron stayed over at her place the next night, Janey said she awoke to him raping her. Janey said she did not consent that evening because of her wishing to remain faithful to her partner, while acknowledging that she had previously had consensual sex with Cameron.<sup>81</sup>

<sup>77</sup> *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [122(c)].

<sup>78</sup> *R v Singh* [2015] NZCA 435 at [33].

<sup>79</sup> Hon Justice Mathew Downs and Hon Justice Mark O'Regan “Evidence Update” in *Criminal Law Symposium* (NZLS CLE Ltd, Wellington, 2016) 3 at 7.

<sup>80</sup> *W (CA537/2012) v R* [2012] NZCA 567 at [11]. See also *Hartley v R* [2014] NZCA 162 at [77] and *T (CA71/2017) v R* [2017] NZCA 166 at [28]. For a contrary approach to the link between sexuality and credibility see *Pegler v R* [2015] NZCA 260, distinguished in *Jones v R* [2018] NZCA 288 at [24].

<sup>81</sup> See the discussion of the admissibility of the evidence of consensual sex with the defendant at [186](#).



The defendant applied to offer evidence of Janey being sexually attracted to another man previously, Eddie, whom she had ended up kissing and cuddling. While there was some discussion as to whether section 44(1) applied to this evidence (offered as relevant to whether she consented to having sex with Cameron) the judge determined it was inadmissible as insufficiently relevant:

*On balance, I ruled that the questions will not be asked. They have no relevance beyond questioning her professed fidelity, and her determination. Clearly it has been established that her fidelity had lapsed. The possibility of her having been attracted to some other male is of such marginal relevance that it is not directly relevant to a question in issue.*

We agree with this decision. Clearly the fact that Janey kissed and cuddled another man on a previous occasion is irrelevant to whether she consented to having sex with Cameron. To the extent that Janey's evidence is that she did not consent because of wanting to be faithful to her partner, even in the absence of what is already known about her and Cameron, what happened with Eddie does not contradict that claim to the extent required by section 44(3).

In *Nash* both the Crown and the defence wanted evidence of the complainant's sexual relationship with her ex-partner to be admitted. Holly had been dating the defendant, Alton, but had told him she did not want to have a sexual relationship with him. One night, while out socialising at a gathering, Alton isolated Holly and vaginally and anally penetrated her, leaving her with injuries. Alton said that the sex was consensual.

Holly had told the police that she had broken up with her previous boyfriend, but that they remained on good terms and would have sex casually now and then. She told the doctor during the medical examination that the last time she had had sex (before the alleged rape) was with her ex-boyfriend the night before.

In a pre-trial ruling defence counsel agreed that the prosecutor could offer evidence of the previous relationship, when it ended, and whether Holly and her ex-partner Troy ever engaged in anal sex (in order to determine whether her injuries were caused by Alton). The trial judge was of the view that the relevance of this line of inquiry was provided by the temporal connection based on what Holly reported to the doctor. The trial judge also confirmed that the defendant should be permitted to explore the differences between Holly's two statements about when she last had sex with her ex-partner for the purpose of challenging her credibility.

In our opinion, evidence of the ongoing casual sexual relationship between Holly and her ex-partner is insufficiently relevant to the issue at trial – which was whether Holly consented to having sex with Alton. Although it may have strengthened the prosecution’s case to establish the injuries had no other source, a better approach would have been to offer the evidence in re-examination (or in rebuttal), if indeed the defendant had wanted to suggest Troy was responsible (and was granted permission to explore this topic).<sup>82</sup> Further, we do not agree that evidence of Holly’s varied reports as to when she last had sex with her ex-partner meets the heightened relevance test in section 44(3), given the rationale for the rule: preventing an illegitimate link between sexuality and credibility. Although it is of course permissible to challenge a witness based on inconsistent statements about a fact in issue, in this context the inconsistencies were irrelevant to the issue of consent, and not sufficiently relevant to Holly’s credibility to satisfy section 44(3). Instead, the jury ended up hearing much information about Holly’s casual sexual relationship with an ex-partner in order to (ultimately) determine whether she consented to having sex with Alton. In our view, the judge was insufficiently attentive to the intentionally strict controls of section 44, which governs the admissibility of such evidence – even though counsel were in agreement.<sup>83</sup>

The argument made by the prosecutor in *Nash*, concerning the risk of jury speculation, was also present in the defendant’s application in *Masters*. The defendant, Darryl, had recently met Nadine through work and they had been socialising together. After an evening out drinking with friends, Darryl ended up at Nadine’s house. Nadine said she rebuffed Darryl’s advances, telling him that she did not want to have sex with him because she was not currently using any contraception, and did not want to use a condom: “I’m not gonna have sex with you even with a condom”. She told the police that she had explained to Darryl that two weeks previously she had unprotected sex with a mutual friend, George, and had taken the morning-after pill, which she did not want to do again. This explanation had been edited out of her EVI by the Crown as it was viewed to be in breach of section 44. Nadine then went to bed, where Darryl was already asleep, but said she was woken by Darryl raping her, which Darryl claimed was actually consensual sex.

The defendant applied to cross-examine Nadine about her sexual relationship with George, as relevant to whether she consented to have sex with Darryl. The following is the discussion with the trial judge in the absence of the jury:

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82 The medical evidence was that semen from an unidentified other male was also found near the site of Holly’s injuries. This does not alter our reasoning. Previous consensual sex remains irrelevant even if on the night before. Evidence of the presence of other semen was inadmissible in our view.

83 The risk of illegitimate reasoning was not overlooked by the Court of Appeal in *Schollum v R* [2019] NZCA 69, in which defence counsel argued that the fact the complainant had (allegedly) kissed another man on the same night was admissible to challenge her credibility, when the issue at trial was consent. The Court held: “We also agree with the judge that allowing Mr Schollum to cross-examine ... the complainant in the manner proposed would carry a serious risk of illegitimate reasoning by the jury” at [16].

DEFENCE: *The jury might say, well, this girl has said she wasn't on the pill and we can understand why she wouldn't want to have sex with a man not wearing condom if she were not on the pill. So, it goes to where credibility if you like, but it is important in the interests of a fair trial that the jury knows that in fact that she is quite willing to have sexual intercourse with a male around this time who was not wearing a condom, the same as when her and Mr Masters.*

JUDGE: *Well doesn't it go further than that also?*

DEFENCE: *To motive?*

JUDGE: *And doesn't it go to the issue of why she might claim she had been raped by this accused if George found out they had had sexual contact.*

DEFENCE: *Quite.*

The judge granted leave, giving the following decision:

*Defence counsel asks for permission essentially for two reasons:*

- (a) [Nadine's] willingness to have sexual intercourse with another male only a week or so earlier when not on the pill and without a condom must go to the likelihood or unlikelihood that she would have intercourse in similar circumstances with the accused;*
- (b) It may provide a reason for the false complaint; in that fearing that [George] would learn of her sexual activity with the accused ... that she had categorised it as a sexual assault to remain in good favour with [George].*

*In my view, the proposed questioning is of such direct relevance to the facts in issue at trial that it would be contrary to the interests of justice to exclude it. It must, it seems to me, be relevant in the jury's assessment of the likelihood and unlikelihood of the complainant engaging in sexual intercourse while not on the pill and without a condom with this accused that she done so with someone else a short time beforehand ...*

*As well, of course, the fact of a sexual relationship with [George] only a week or so beforehand must be relevant, it seems to me, to the truthfulness or otherwise of her account.*

This is a startling example of a judge admitting the evidence of a previous sexual relationship by identifying and reinforcing the twin myths that section 44 was enacted to challenge and disrupt: it is more likely that Nadine consented to unprotected sex with Darryl because she had unprotected sex with George; and, it is more likely she is lying about her absence of consent because of wanting to protect her relationship with George. Of further concern is that it is the judge who emboldens defence counsel to offer the evidence for two purposes.

The mere fact that the complainant had consensual sex with another man within the week prior to the alleged offending does not make it more likely that she had consensual sex with

the defendant; appellate authority is clear on that point. It is immaterial whether the previous sex was protected or unprotected, in our view. To use the words of Lady Hale in *R v C*:<sup>84</sup>

*It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.*

The arguable point of difference seized on in *Masters* is that Nadine, in explaining to Darryl why she does not want to have sex with him, says she does not want to have unprotected sex with *him*. It remains irrelevant that she had, or would be open to having, unprotected sex with *someone else*. This is her given reason for saying no to him that night – perhaps to avoid the unpalatable, or hard to articulate sensitively, reason. For example, that she finds him unattractive or annoying or he smells bad, that she is too tired or too intoxicated, that she is hoping to start a relationship with someone else, or she is just not feeling like sex (with anyone). If Nadine had just said no, without giving the (gentle let-down) contraception reason, the evidence of her sex with George would clearly have no relevance. The fact that she did so exposes her to questions about her sexual relationship with George. Given the protective nature of section 44, can it really be said that evidence about her and George has sufficient probative value to the issue of whether she consented to having sex with Darryl? The argument that Nadine has a propensity to have unprotected consensual sex is nevertheless strongly reinforced in the defence closing:

*Now, the final point that I want to make to you members of the jury is that this relates to the evidence that you heard during the cross-examination of [Nadine], when you learned that her relationship with George was sexual. They were more than just good friends and very significantly we now know that as recently as just a few days before she first met Darryl, she had engaged in unprotected sexual intercourse in her same bed with him. Unprotected sexual intercourse in her same bed with him. And at that time too she was not on the pill. No condom was used, and it was all perfectly consensual. So, there is propensity here isn't there on her part to have unprotected sex with a male when she's not on the pill and the male's not wearing a condom, just a week before. And as the defence says, indeed it was, less than two weeks later when it happened with Darryl.*

The second ground for admission was that the evidence had relevance to the issue of whether Nadine lied about not consenting to sex with the defendant in order to protect her relationship with George. As in the other cases in which evidence of a sexual relationship with another person is offered as a motive to lie, we do not consider that the test in section 44(3) is met here. In the judge's summing up, there is nevertheless a reference to how the jury may appropriately use the evidence:

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84 *R v C* [2009] UKHL 42 at 27.

*So, what is the relevance of this evidence? How, if at all, does it help you? The evidence is relevant to your consideration of two important issues. Firstly, the likelihood or unlikelihood she would have consensual sex with the accused while not on the pill and without a condom and secondly, whether she has invented her claim of lack of consent and being asleep in order to keep in good with George.*

*Now the Crown say this evidence helps you in your assessment of her credibility and reliability. She had sex with George shortly beforehand without a condom and with no contraception. On that occasion she had to get the morning-after pill. She did not want to go through that again and that is why the Crown say she told the accused this and why she would not have consensual sex with him on this occasion.*

*On the other hand, the accused says this evidence shows she was prepared to have consensual sex without protection and contraception. It shows why she would make up her claim of a lack of consent and being asleep to try and keep in good with George.*

In the Pilot case of *Sarkisian* the defendant, Jordyn, applied to cross-examine the complainant, Katrina, about her having sex with her husband two days after the alleged rape on Sunday evening, in order to challenge her credibility regarding her claims as to her pain levels. The judge, applying section 44, ruled that the evidence did not have sufficient relevance for this purpose and was inadmissible, noting the risk of illegitimate reasoning by the jury:

*Briefly, my reasons [for denying the application] are:*

*(a) The evidence is that any pain or physical discomfort had resolved by Sunday morning;*

*(b) It follows from (a) above that the defendant's suggestion, which was put in cross-examination to the complainant, that she has either made up or exaggerated her level of pain and discomfort in order to bolster a false allegation of rape, is not assisted by allowing her to be questioned about having intercourse with her husband on Sunday evening;*

*...*

*(d) Additionally, allowing the complainant to be cross-examined with a view to establishing she had intercourse with her husband almost two days after the alleged rape, risks inviting the jury to reason illegitimately. There is no evidence, and nor could there be, that such behaviour is inconsistent with the truth of the allegations. A rape myth or misconception has no place in proper deliberations.*

We agree with this decision and note the judge's attention to the rationale of section 44, and to the risk of illegitimate reasoning.

### **Evidence of the complainant not having previously engaged in conduct alleged to be undertaken with consent (to bolster credibility or establish lack of consent)**

If evidence of a complainant's sexual experience may be used to challenge her credibility, then arguably it may also be used to bolster her credibility. The prosecution could therefore seek to offer evidence, of virginity for example, to support the complainant's version of events. As stated in *Taiatini v R*, section 44 "is for the protection of complainants";<sup>85</sup> therefore, evidence of sexual experience offered to bolster the complainant's credibility is not in conflict with the purpose of the rule. However, evidence relevant to credibility has not been admitted in other appellate cases.

In *Hartley v R* one of the issues was the age of the complainant at the time he was allegedly first sexually assaulted.<sup>86</sup> Both in evidence in chief and more emphatically in cross-examination, when challenged about gaps in his memory, the complainant responded that he knew he was only 13 or 14 because it was his first sexual experience and as it was with a 40-year-old man he testified: "I'm never going to forget it and I wish I could".<sup>87</sup> The Court of Appeal held the evidence should not have been led by the Crown, in breach of section 44,<sup>88</sup> going on to say:<sup>89</sup>

*In a case such as this where the evidence goes only to veracity, the standard requires that the proposed evidence should possess such relevance and quality as to have a major impact on the complainant's credit.*

Similarly, in *Bruce v R*<sup>90</sup> the Court held that the complainant should not have been permitted to say: "I've never had sex after drinking alcohol ever in my life and before I've never kissed in that way. So that's got nothing to do with alcohol. That's just the way I am".<sup>91</sup> The Court concluded it was "plainly inadmissible" under section 44(1) and evidence of "a lack of sexual experience is not probative of whether the complainant consented on this particular occasion".<sup>92</sup> There was no discussion as to whether the evidence was relevant to the complainant's credibility.

However, in *K (CA 640/2016) v R*<sup>93</sup> the appellant argued that the evidence of the complainant's virginity, and the evidence that her delay in complaining was for cultural reasons connected to that loss of virginity, should not have been admitted into evidence. The Court of Appeal disagreed:<sup>94</sup>

85 *Taiatini v R* [2014] NZSC 122, [2015] 1 NZLR 409 at [60].

86 *Hartley v R* [2014] NZCA 162.

87 At [71].

88 At [72].

89 At [77].

90 *Bruce v R* [2015] NZCA 332.

91 At [32].

92 At [39].

93 *K (CA 640/2016) v R* [2017] NZCA 336.

94 Citations omitted.

- [17] This Court has consistently held that evidence of a complainant's virginity relates directly to his or her prior sexual experience and is therefore captured by the prohibition in section 44(1) of the Evidence Act. It is therefore inadmissible unless it is of such direct relevance to issues in dispute in the proceeding that it would be contrary to the interests of justice for the jury not to hear it. In *R v Tainui*, it was said that evidence would meet that test if it forms a crucial part of a narrative of the alleged offending.
- [18] The evidence the jury heard which we have set out above did not, we think, engage section 44(1). Whilst it is arguably implicit in these passages that the complainant was a virgin prior to the offending, her evidence does not positively assert that fact, but simply assumes it. Nevertheless, even if section 44(1) were engaged, the evidence undoubtedly met the section 44(3) threshold for admissibility.
- [19] The complainant's fear of disclosure of sex prior to marriage was a critical part of her explanation as to her reaction to the offending and why she took no steps to complain about the offending while it was ongoing. The evidence is therefore both part of the narrative and of such direct relevance to issues in dispute that it would be contrary to the interests of justice to exclude it.
- [20] In any event, on the Crown case, the offending began when the complainant was between 10 and 12, when it could be assumed that she was a virgin. Therefore, we do not think that prejudice could have been caused to Mr K by the admission of this evidence.

In *Arona v R* the Court of Appeal held that evidence of the complainant saying to the co-defendant, in an audio recording played at the trial, that she was not a one-night-stand kind of girl, was inadmissible and should have been excised from the recording.<sup>95</sup>

In the Pilot case of *Lowrie*, the trial judge considered the admissibility of evidence that the complainant, Jihee, was a virgin at the time of the alleged rape. The defence wanted to offer evidence of her virginity to explain the presence of blood on the sheet; her use of a tampon to stop the bleeding; and, to rebut an inference, or speculation, that the defendant, Travis, had been rough with her. Defence counsel expressed the view that this use of the evidence did not fall within the mischief of section 44:

*Finally, sir, I'm conscious obviously of that section that it's a shield to prevent questioning of calling that person promiscuous etc., and this one question won't do that. So, if we look at the purpose of the section in my submission it doesn't offend the purpose of the section.*

<sup>95</sup> *Arona v R* [2018] NZCA 427 at [38].

Offering evidence for this purpose (rather than to challenge credibility or establish lack of consent), does not invoke either of the “twin myths”. The judge was of the opinion that section 44 would operate to control admission of the fact of Jihee’s virginity for other purposes:

*Well, I don’t think section 44 prevents you asking about her menstrual cycle, but it most certainly prevents you asking whether she was a virgin at the time. Are you seeking to ask her that?*

In the ruling, the judge prefers to limit the evidence of virginity to be given by the examining doctor, and that the complainant should not be asked whether she was a virgin at the time:

*The complainant may not be questioned about her virginity, but I give permission for the evidence of virginity to be led from the doctor for the following reasons:*

- (a) The question has already been asked by the doctor during the medical examination. That was, of course, a different environment than giving evidence on oath, but there is no challenge to the accuracy of the answer recorded by the doctor.*
- (b) Leading the evidence from the doctor much reduces the likely embarrassment and any possible trauma arising from the complainant being asked in Court.*
- (c) The evidence is of direct relevance to facts in issue, namely the circumstances surrounding and nature of the sexual activity and reason for bleeding.*

As already discussed, appellate authority indicates the need for clear articulation of why evidence of virginity might be relevant. In our view, there is no conflict with the rationale of section 44 to allow such evidence, even if offered as relevant to the issue of consent. While it seems at odds with the concern about propensity reasoning that section 44 seeks to limit, in our view the context and consequence are different. Why should the fact-finder not also consider the likelihood of a young woman having sex for the very first time in the situation described at trial? We are uncertain why the judge considers that being asked about being a virgin might cause embarrassment and trauma and are concerned that ruling such evidence should not be offered prevents the potentially important bolstering of the complainant’s evidence.

The issue of a lack of sexual experience which may bolster the complainant’s evidence arose in the principal research case of *Jackson* (see also the Pilot case of *Kata*, discussed above).<sup>96</sup> In this case the complainant, Yasmin, was drinking and socialising at a friend’s house after an evening out. She became heavily intoxicated, from a combination of drugs and alcohol, had been vomiting outside, and was put to bed in the same bed where the defendant, Richard, was already sleeping. Yasmin did not know Richard previously and said she had no memory of being put into bed with him but woke to him having sex with her, which Richard said was

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96 At 146.



consensual. In examination-in-chief an aspect of Richard's statement to the police was put to her:

Q: *Yasmin, Mr Jackson was spoken to by the police following the investigation. Are you aware of the detail of what he said to the police?*

A: *Um, to some extent yes.*

Q: *And what's that?*

A: *That it was consensual.*

Q: *I'm just going to read to you what Mr Jackson said to the police and I'm going to ask you to respond. He said, "I did have consensual sex with Yasmin Paulin, both vaginal and anal and Yasmin consented to all of our sexual acts together. I'm sure she was consenting by what she said and did which included playing with my penis and her holding my hand down her pants. She also told me to spit on her arse and put it up her arse. She then told me she was going to come and moaned loudly." What do you say about that?*

A: *I think that's disgusting and I would never say that.*

JUDGE: *Well there were quite a lot of things attributed to you there. Do you recall saying or doing any of the things that he has mentioned?*

A: *No, I don't.*

Q: *Is it possible that you did them and because you were intoxicated couldn't recall having done so?*

A: *Yes, but I've never done that before in my life so I would not have done that in my intoxicated state.*

Examination-in-chief continues:

Q: *When you say "I haven't done that in my life", what are you referring to there?*

A: *Just all the things that were said that I just – that wouldn't even come out of my mouth even in a relationship with a person, I just wouldn't say that kind of stuff.*

There is no discussion as to whether it is permissible for the complainant to say that she would never have ever done, or said, those things as she has never done them before (so no previous disposition or propensity).<sup>97</sup> Her evidence supports her version of events and is not viewed as irrelevant or triggering section 44. In cross-examination she is asked about other matters she allegedly talked to the defendant about:

97 In the cross-examination of the complainant in *Sarkisian* she says, without objection: "I am not a person that would go around sleeping on my husband".

Q: *And during your having sexual intercourse with Mr Jackson you talked to him about a threesome, didn't you?*

A: No.

Q: *Also talked to him about anal sex didn't you Ms Paulin?*

A: *(no audible answer)*

Q: *You talked to him about anal sex and you told him to spit on your arse and put his penis in, correct?*

A: No.

Q: *And as my learned friend read out to you, you told him you were going to come and you asked him if he liked it, correct?*

A: No.

Q: *Thank you. All of these individual aspects of what Mr Jackson says happened, could well have happened, did happen but you just don't remember them do you?*

A: *I would remember if that stuff happened.*

Following further cross-examination regarding Yasmin's statement to the police, a discussion in the absence of the jury was held about a range of matters. During this discussion, the prosecution sought permission to call a witness, a man Yasmin had previously met, who said that earlier in the evening, while Yasmin was intoxicated and under the influence of ecstasy, she had rebuffed his advances. The Crown argued that this is evidence offered to rebut the defence characterisation of Yasmin as a "good time" girl, willing to have indiscriminate sex – rather Yasmin is able to set boundaries and be clear about them:

*Without saying that she is promiscuous the suggestion [put by the defence] is still that she was up for consenting to sex with a complete stranger and making suggestions of threesomes does paint a certain picture of a girl. And yet at 3.30 am when given an opportunity she was very clear about her sexual boundaries and able to express them [audio unclear] ... Defence want to suggest less than three hours later things have changed so much that she was open to sex with a stranger, anal sex which she doesn't on her own evidence practice. Allowing the evidence would give some balance as to her general propensity.*

Despite the details (and content) of what she supposedly said to Richard being put to her, the judge ruled that the witness could not be called and the evidence not offered as it did not have sufficient probative value. The defence argued that the case was not about Yasmin's promiscuity, and claims had been careful to avoid making that argument.

In our view, evidence of how Yasmin behaved to another man on the same night and sufficiently proximate in time to the alleged offending has relevance – especially when offered to counter the claims made by the defendant about his interaction. It is certainly

troubling when previous incidents of sexual interest by a complainant regarding someone else are admitted as relevant to whether she consented, while her ability to say no to someone else, prior to becoming intoxicated, lacks sufficient probative value. If the rationale for the admission of propensity evidence exists with regard to actual sexual conduct or disposition, why does it not also apply regarding the absence of such conduct?

**Evidence of the complainant's willingness to engage in sexual activity with more than one person at the same time (for the purpose of establishing consent or to challenge credibility)**

As also noted above in the context of the *Jackson* and *Edwards* cases, allegations about the complainant's desire to participate in a threesome are not infrequently made. There are also two recent appellate decisions regarding the admissibility of such evidence.

In *Jones v R*, as previously mentioned, the Court of Appeal held that a number of pieces of evidence indicating that the complainant had a sexual interest in the defendant and his girlfriend fell outside section 44(1).<sup>98</sup> The defendant's argument was that he believed the complainant was consenting to have sex with him as she was interested in a "threesome"; therefore, it was not evidence about sexual experience with someone *other than* the defendant. The Court concluded that even if section 44(1) was engaged, most of the evidence was admissible under the heightened relevance test in section 44(3), as being relevant to the issue of J's belief in consent.<sup>99</sup>

In *Arona v R* the appellants (convicted of sexually violating C, a previous workmate of A) argued that evidence of C's previous sex with two men while intoxicated should have been admitted to show that C is "prone to participate in group sex and blame intoxication afterwards".<sup>100</sup> The Court of Appeal applied the reasoning in *Best*, accepting that the evidence of C's friend M to the effect that C was embarrassed by her behaviour on the previous occasion and may have claimed to be more intoxicated than she was, "may have some bearing on [C's] veracity".<sup>101</sup> However, the Court held that the evidence was not substantially helpful, nor was it clear that C had lied about her condition on the previous occasion. The Court agreed with the trial judge that the evidence did not meet the section 44(3) test, noting that the submissions made it plain that the appellants also wanted to show that C had a propensity to engage casually in group sex, which was "plainly illegitimate".<sup>102</sup>

98 *Jones v R* [2018] NZCA 288 at [39]–[41].

99 At [48] and [54].

100 *Arona v R* [2018] NZCA 427 at [13].

101 At [24].

102 At [28].

Our concern about admitting evidence of the complainant's participation in a threesome, or willingness to engage in a threesome, is the risk that the evidence will be offered to establish the complainant's propensity to have indiscriminate sex, undermining her ability to consent (or not) to having sex on each particular occasion. Any evidence of unconventional sex carries with it this risk, and care must be taken to ensure in all cases that evidence of the complainant's sexual experience has sufficient relevance to the issues at trial.

In the same way that evidence of the complainant having consented to having sex with another person is irrelevant to the fact of consent in the particular case (except in very rare cases of highly specific sexual practices),<sup>103</sup> evidence of a willingness to engage in threesomes generally, or on a specific previous occasion, cannot be relevant to consenting to sex with *one person* on this occasion.<sup>104</sup> The logical link between such evidence and its probative value to an issue at trial is even more tenuous when the evidence being offered (by the defence) is of a *possibility* that the complainant *may have discussed wanting* to have a threesome while talking to the defendant, or to a third person.

In *Depak* the young complainant, Rachel, was socialising at the home of a workmate, who lived there with her boyfriend (the defendant Reji) and his family. It was agreed that Rachel would stay the night (sharing a bed with the defendant's sister) and alleged that during the night, while she was asleep, Reji raped her. Reji's defence was that it was consensual. At trial a section 44 application was made concerning Rachel's sexual interaction with a young woman Jay (the defendant's sister) earlier that evening. The judge ruled that such evidence was part of the narrative and admissible. Rachel's evidence on this point was that she was lying on Jay's bed when Jay kissed Rachel and caressed her. The following is an extract from the cross-examination on this point:

**Q:** *How would you describe [what happened with Jay]?*

**A:** *It – well we were sitting next to each other on the bed and under the covers and she was more like, oh, we're tired let's go to bed so we laid down and we kind of just talking still and then she rolled over and kissed me and then moved me closer and I was like, "Oh, no I'm not into girls", and she's like, "Oh, okay", and then Reji had walked in and said, ah, he's like, "Oh, are you two getting close?" and kind of laughed and then walked back out and we're like, oh, she was fine about it so.*

**Q:** *Well he didn't walk back out because he actually sat down and lay on the bed next to you and Jay. Can you recall that?*

<sup>103</sup> We argue that participating in a threesome is not of this kind. In research published in 2017 in the United States, one in five men and one in 10 woman reported having had a threesome: Debby Herbenick et al "Sexual diversity in the United States: Results from a nationally representative probability sample of adult women and men" <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0181198>

<sup>104</sup> See also the discussion of *Cropp* at 194.

A: No, I can't.

JUDGE: Well did that happen?

A: Ah, I can't remember, sorry.

Cross-examination continues:

Q: So, it could have happened?

A: Yes.

Q: So, can you recall actually grabbing him? His leg or some part of his body when he was lying next to you? What –

A: No.

Q: Mmm?

A: I didn't grab his leg.

Q: Or touch him in any way?

A: No.

Q: Did you at that stage suggest a threesome?

A: No, I did not suggest a threesome.

Q: When Jay was lying on the bed?

A: No.

Q: Is it possible that in your drunken state that you may have suggested that?

A: No, no.

Q: And did Reji say, "Nah, that's my sister". Can you recall that?

A: No.

Q: Is it possible?

A: I have a boyfriend and I wouldn't have done that. Can't – that's not what I've said in any of my interviews, it's ...

The defence closes on why the interaction between the complainant and Jay is relevant to the issues at trial (specifically consent):

*The reason why this sexual activity between these two women is relevant is because he says because the evidence is that this sexual activity between the two women led is part of the narrative that led to the consensual intercourse between the complainant and Mr Depak. It's part of the narrative in that there was sexual activity between those two women and then he came in the room and according to [his sister] the complainant switch[ed] her interest from her to Mr Depak and the body language suggested to her that Rachel was flirting, flirtatious with Mr Depak ...*

Jay gave evidence at trial that the complainant did not suggest a threesome, but her evidence, based on our access to the closing arguments, was that Rachel was “flirting” with Reji. However, it was not necessary, in our view, for the evidence of any sexual interaction with Jay to be admitted in order for evidence of Rachel’s alleged flirting to be offered. There already existed an explanation of why Rachel and Jay were in a room together. Further, this was evidence of the complainant being clear that she did not want to pursue sexual intimacy with Jay, and Jay respecting that decision. In other contexts, rebuffing an earlier advance is viewed as irrelevant (see *Jackson*),<sup>105</sup> but this evidence allows the claim of the complainant being up for a threesome and sexually uninhibited, despite her young age, and the fact that Reji is her friend’s boyfriend. We do not agree that such evidence was an essential part of the narrative.

In *Roberts* the complainant Lara had very little memory of the alleged rape, as she claimed she was drugged and intoxicated, while socialising with friends and family at home. She had some physical injuries and there was evidence of drugs in her system. Her son witnessed the defendant, Callum Roberts, having sex with his mother, during which she appeared to be asleep or out of it. Lara had met Callum through her ex-partner and they had a friendship that involved Callum assisting her with her children and around the home. Callum claimed the sex was consensual, and that he had an ongoing sexual relationship with Lara, which she denied. Callum sought to offer evidence of threesomes with him, Lara and her ex-partner (which the ex-partner denied). The judge permitted the defence to cross-examine Lara about the threesomes and to call evidence about their occurrence:

*Given the complainant’s denial of any sexual relationship with the accused; given that what the accused proposes is not the central mischief at which section 44 was directed because the accused runs the risk of doing at least as much damage to his own as to the complainant’s reputation; given that evidence of this alleged event would – if the claim is true – be likely to be rendered artificial if the accused were obliged to exclude from it his claim of [Lara’s ex-partner’s] involvement; and, finally, given the opportunity for some allegedly independent corroboration which the provision of such evidence would create by allowing the introduction of the evidence of [a family friend], I am of the view that the accused should be permitted to cross-examine and call evidence on the issue. For the reasons already canvassed I am of the view that the material – if accepted – is of such direct relevance to the facts in issue by being **directly relevant to the credibility of the complainant** with respect to her account of sexual intercourse without consent, that it would be contrary to the interests of justice to exclude it from consideration.*

In this case, the evidence of previous threesomes was subject to a section 44 analysis, and the judge ruled that it was admissible on the basis that it was evidence that challenged the

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105 At 180.

complainant's credibility (given she was denying any previous sexual conduct with Callum). However, given the denial by the ex-partner and only "allegedly" independent corroboration, the probative value of such evidence seems low when offered to determine whether the complainant consented to sex with Callum that night. The evidence was eventually not offered at trial, in keeping with the defendant's instructions, but the judge granted permission (finding that section 44(1) did not apply) to ask Lara whether she had had a sexual relationship with anyone since separating from her partner. She said, no.

### **Evidence of the complainant taking or sharing sexually provocative photographs of herself (for the purposes of establishing consent)**

In *Harete* the complainant Hazel McKay was walking home alone, intoxicated, and encountered the defendant Hone, who she alleged raped her, although she had a patchy memory of the events. Hone claimed it was consensual. At the trial the defendant wished to offer in evidence photographs that Hazel had taken of herself in sexually provocative poses and posted on Facebook. On the basis that the postings were being offered to establish that the complaint had consented to having sex with Hone, the judge, correctly in our view, denied the application:

*This is an application for leave to cross-examine the complainant by putting to her a series of photographs. It has to be said that in a soft-core fashion, some of these photographs might be thought to be sexually provocative. The submission could only follow from that this defendant is promiscuous and more likely therefore to have consented to the acts alleged by the Crown. That, with respect, appears to be precisely the type of reasoning which section 44 was designed to preclude and in my view, the evidence which is proposed to be introduced here in any inference that might be invited from them, is simply to the effect that the complainant is promiscuous and more likely to have consented on this occasion for that reason. Therefore, I am afraid, the photographs cannot be put to Hazel McKay and cross-examination will have to be confined within the limitations of section 44.*

### **Summary on the admission of evidence of sexual experience under section 44(3)**

This analysis demonstrates that there is inconsistency in admissibility decisions made under section 44(3), especially in the cases in the principal research. With regard to the pilot study the analysis indicates that despite the introduction of the section 44A notice requirement, decisions are still having to be made during the trial and under pressure, even in situations where the need for a decision would have been apparent pre-trial. Further, evidence of the complainant's sexual experience with someone else was admitted in cases in the principal research on the grounds of relevance to an assessment of the complainant's credibility, despite that being counter to the rationale of the section.

Despite the analysis identifying issues with the operation of section 44A, generally the admissibility of evidence of a complainant's sexual experience (matters clearly falling within section 44) was dealt with in the Pilot cases through appropriate consideration of the rationale of the section and by clear consideration of the proposed purpose and use. In at least one case, agreement was reached to avoid the need for a section 44 application by the careful editing of the EVI. It appears that in general the case management processes in place for the Pilot are assisting with the timely and well-considered application of section 44(3). As stated above, however, there are still inconsistencies within the Pilot cases with regard to the scope of section 44(1) and, therefore, the extent to which decisions under section 44(3) are required.

Further, we have concerns about the extent to which evidence about the complainant's sexual experience, or disposition, is being offered by consent, or as a consequence of an absence of well-formulated Crown submissions (especially during the trial).<sup>106</sup> Section 44A must be enforced more consistently in our view, and in the absence of the prosecutors' willingness to robustly contest an application to admit evidence of sexual experience, thought should be given to the appointment of independent counsel for the purposes of such admissibility decisions.<sup>107</sup>

Finally, we note the absence of jury directions as to the appropriate use of evidence of sexual experience when admitted. We recommend development of such directions that make it clear to the jury what legitimate purpose the evidence can be used for during their deliberations.<sup>108</sup>

### ***Admission of evidence of the complainant's sexual experience with the defendant***

In three cases in the pilot study and four cases in the principal research evidence about the complainant's sexual experience with the defendant, including evidence of her "disposition" in sexual matters, was admitted. Currently section 44(1) only applies to evidence of the complainant's sexual experience with a person *other than* the defendant, meaning that it is currently treated as propensity evidence (defined in section 40) and admissible subject only to sections 7 and 8. Therefore, such evidence must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding.

<sup>106</sup> Our observations that applications under section 44 were made during the trial, not pre-trial; that rulings were ignored or applications not made and that evidence was often admitted by consent mirror the findings in Liz Kelly, Jennifer Temkin and Sue Griffiths *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06, London, 2006) at 41–55. <https://webarchive.nationalarchives.gov.uk/20110218141402/http://rds.homeoffice.gov.uk/rds/pdfs06/rdsolr2006.pdf>

<sup>107</sup> See Recommendation 16 in Chapter Ten.

<sup>108</sup> See Recommendation 34 in Chapter Ten.



In two cases (*Moss* and *Waititi*), the complainant was asked in cross-examination if she had been flirting with the defendant previously that evening. The complainant in *Moss* denied that she did. She was also asked if she flirted with another (younger) man at the same party, which was permitted without any recourse to section 44.<sup>109</sup> In *Waititi*, the complainant was asked about her interaction with the defendant earlier in the night, which she denies was flirting, also saying that she did not recall any of the so-called “flirting” behaviour:

Q: *And as you continued to consume alcohol and partake in the use of cannabis, you were enjoying the company of Mr Waititi and others, weren't you?*

A: Yes.

Q: *You were laughing and joking with him?*

A: Yes.

Q: *You took photographs with him together to put on Snapchat?*

A: *I don't recall that but it's possible.*

Q: *At one point you sat on his knee and took a photo of the two of you together?*

A: *I don't recall that.*

Q: *Is it possible?*

A: Yes, it's possible.

Q: *At one point you complimented him on his physique, said that he had nice muscles?*

A: *That's also possible that I commented on his muscles.*

Q: *So, what I'm suggesting to you, Ms Fan, is that there was a degree of familiarity and flirtation in terms of your interaction with Mr Waititi **during the early part of that evening?***

A: *I would disagree with flirtation. I think that you can comment on someone's body type without flirting with them and you can laugh with someone without flirting with someone.*

Q: *Do you think sitting on someone's lap could be construed as being flirtatious?*

A: *Without knowing the context of that, no.*

Q: *Well according to you this was the first time you'd ever spent any time with Mr Waititi, wasn't it?*

A: Yes.

In this case, Livi Fan gave evidence that she became intoxicated during a party at her house, and was put into her bed by a friend. She woke later to find the defendant, Iain Waititi, raping her. It is put to her that she was conscious and consenting, following flirting with Iain during

109 See above at 134.

the earlier part of the evening (see emphasis added above). Iain was a neighbour whom Livi had never previously met and was 11 years younger. The alleged flirting behaviour could only have been relevant to her consent or his reasonable grounds for believing she was consenting.

We previously argued, with regard to *Moss*, *Wilde* and *Yamada*,<sup>110</sup> that flirting or dancing with someone else, even if earlier on the same night, is irrelevant to whether the complainant would consent to having sexual intercourse with another person later that same night, after going to bed (alone) in an intoxicated state. We also consider that flirtatious behaviour with the particular defendant is irrelevant to whether there was consent given later in the same circumstances. Further, with regard to the defendant's belief in the existence of consent, the fact that the complainant was flirting with someone else cannot provide reasonable grounds that she later consented to have sexual intercourse *with him*. In terms of the complainant's flirtations with the defendant earlier in the night, *even if* Livi had sat on his knee and complimented his muscles "during the early part of that evening", we also consider that such behaviour cannot, and should not, of itself, provide Iain with reasonable grounds to believe Livi consented to sexual intercourse with him.

While in this case Iain was convicted, the admission of, or questions about, earlier evening "flirting" behaviour with the defendant must be carefully scrutinised. Consent must be given at the time of the sexual act – not in advance.<sup>111</sup> While it is accepted that the defendant must be able to put his case, that cannot be done with disregard to the requirements of the rules of evidence. While flirting on the night might, in some circumstances, be considered relevant to consent or belief in consent, any such relevance is very context-specific. Allowing these types of questions, and in doing so neglecting to inquire into the lack of logical link between commenting on someone's muscles and consenting to sexual intercourse, operates to reinforce contestable beliefs about women's sexual availability.

In *Redman*, another Pilot case, the complainant is asked about her "close" and "uninhibited" dancing with the defendant (and others) at a bar earlier in the evening.

- Q: *Do you remember that later at the [bar], you ended up dancing with him?*  
 A: *No that didn't ...*  
 Q: *Sorry?*  
 A: *That didn't happen.*  
 Q: *Well I think Ms Russell will tell us that it did, do you not remember any of that?*  
 A: *No, we were dancing within a group setting but at no point did we dance, just us two.*

110 Above at 132.

111 See further Chapter Seven at 247. See also Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, Montreal, 2018) at 145.

- Q: *Well she I think will tell us that at the [bar], you and Tana were dancing on the stage?*
- A: *Sorry, who would say this?*
- Q: *Ms Joy Russell?*
- A: *So, at one stage I remember being on a stage, in a stage setting but there were other people there, there were other people present.*
- Q: *And she will say that he was awkwardly close to you, almost touching?*
- A: *Well I don't recall that.*
- Q: *And she I think in her statement, we'll hear from her later, said you were really intoxicated, quite loud and super energetic, do you remember being like that?*
- A: *Yes.*
- Q: *And she said of course, not your usual self, just obvious. Mr Redman says that you touched him in the genital area on a few occasions, is that correct?*
- A: *No.*
- Q: *He wasn't sure whether it was accidental or intended?*
- A: *He wasn't sure?*
- Q: *Mmm?*
- A: *What, no I didn't.*
- Q: *Well he says there was some touching, you deny that entirely?*
- A: *I deny that entirely.*
- Q: *But it would be fair to say you'd become quite uninhibited, correct?*
- A: *Yes, but I was still conscious enough because after I'd left that area, entered the VIP area I was sitting down and having a conversation with a friend of mine over text message, so I was coherent enough to be able to conduct a conversation fine.*
- Q: *But the point I have trouble with is this, you're dancing on the stage, very close with a young man you claimed to feel uncomfortable with, can you explain that?*
- A: *I don't understand what you're asking me?*
- Q: *I'm asking you why, if you felt uncomfortable with him, you were dancing with him and you were very close to him, takes two people to get close together doesn't it?*
- A: *Yes. But as I said, I don't recall ever being that close to him.*
- Q: *And that was about the last you saw of him that night wasn't it?*
- A: *Yes.*
- Q: *And you remarked that by, I think 5.30 am when you finally stopped drinking you were the drunkest you'd been for a long time?*

A: Yes.

Q: *He didn't see you in that state at all did he, he'd left hadn't he?*

A: *Yes, well yeah for the final, sorry for the final three hours of the night I would say he hadn't seen me.*

Q: *All he saw was the uninhibited dancing?*

A: *Mhm.*

In this part of the cross-examination, the extent to which the complainant was dancing “close” to the defendant is also used to challenge her credibility – having said she was not comfortable being around him. It is less clear what the relevance is of the evidence she was dancing in an “uninhibited way”. The point previously made remains valid in this context also. The defence theory of the case was that Molly, who did not know Tana Redman well, had been flirting with him all night, and was a willing participant in the sexual intercourse that occurred after 9 am (Molly Rose having gone to bed alone and, on her account very intoxicated, some three hours earlier). It appears that her alleged “flirting” was the dancing and Tana’s (disputed) allegation that she had been rubbing against him, which is referred to in the defence counsel’s closing argument:

*Mr Redman says that at the [bar], Ms Rose was rubbing herself against him. Her friend, Ms Russell, puts it differently. She said, “Tana was awkwardly close to Molly. His body was almost touching Molly but she wasn’t responding,” and that’s in the transcript, you’ll get that eventually if you need to check it. Ms Rose says she has no memory of dancing on the stage with him, no memory at all.*

We remain of the view that even if there had been close dancing (which was also denied), evidence of that fact is irrelevant to the existence of consent or of reasonable grounds to believe in consent. In this trial, which resulted in an acquittal, Tana’s evidence was that Molly engaged in some purposive and reciprocal sexual activity after he went into her bedroom, uninvited, at 9 am. While we accept that these kinds of arguments have traditionally been admitted as part of establishing consent, or belief in consent, when unpacked through the lens of relevance, as they should be, the implication and implicit messages of such questions must be considered. A defendant’s reasonable belief in consent cannot be founded on getting into bed with a woman he hardly knows expecting she will have sex with him based on, at the highest level, some close dancing at a bar some eight hours earlier. Allowing this proposition to be put encourages decision-making based on beliefs about masculinity and sexuality that must be rejected within the trial process, as they are in current public discourse.

In the other four cases (one from the pilot study) in which evidence of the complainant’s sexual experience was admitted, the evidence was of previous consensual intercourse, on an earlier occasion, with the defendant. In one case, *Roberts*, the complainant (Lara) denied the existence of any prior consensual sex, but the defendant gave evidence of them having sex 20–25 times on previous occasions, always after they had been drinking and taking drugs.

The closing address for the defence said:

*He's only ever said one thing at all which is at all disparaging to the complainant and that was the comment about how he would get drunk before having sex with her. He didn't badmouth her on any other occasion but he went on to explain that for both Lara and him sex was always something which is, which was the result of drinking and cannabis, for both of them, that that was their pattern ... "It was an unconventional relationship".*

In *Carter*, the complainant, Theresa Bush, had met the defendant online. They had been out together a couple of times and had consensual sexual intercourse on one occasion a week before the alleged rape. The admission of that evidence, without any admissibility decision,<sup>112</sup> allowed the defendant to argue that "what occurred was certainly in the context of [a] developing relationship". The judge summed up in reference to the defence theory of the case that this was regretted sex:

*What occurred between the two of them was, [defence counsel] said, should be seen in the context of their developing relationship. [Defence counsel] submits that what has happened is that Ms Bush has later regretted allowing the sex to happen and having gone to the police and made a statement and started this whole process she cannot now acknowledge that she might be wrong or that she was wrong.*

*Now, as I said earlier, you may well want to consider the surrounding circumstances, what happened before, during and after, to give you some clues as to what happened to assist you in making the determination that you have to make. As [defence counsel] said, **the two of them had some things in common.** Ms Bush had invited Mr Carter to stay over. This was a week or so after they had met. It seems common ground that consensual sexual intercourse occurred the next morning.*

The judge's reference to the "surrounding circumstances" and that they had sex (once) a week after they met (but a week before the alleged rape) suggests that the previous sex is of significance to the issues at trial. The reference to "things in common" is unfortunate, in our view, as the "things in common" counsel referred to in closing was an interest in sex:

*These two had some things in common. Obviously, an interest in sexual activity. They both had their profiles on the same Internet dating site, and I think you would infer that it's reasonable that both were interested in hooking up with a partner.*

This proposed use of evidence of previous consensual sex is illegitimate in our view. It is irrelevant to the issue of Theresa's consent or Zach's belief in consent that the two had previously had sex, a week before the alleged rape. The other argument in favour of admissibility

112 There was also no indication on the file of any pre-trial consideration of the admissibility of this evidence.

could have been Theresa's explanation for not wanting sex that day – on the basis that she was concerned he had not taken down his profile from the dating site, so in his view it was not “a developing relationship”, at least not a monogamous one. However, the risk with this strategy is that evidence of the previous sex would be used to support an inference that he had a reasonable expectation of ongoing sexual intercourse – an expectation that we consider should not be validated by an admissibility decision.<sup>113</sup>

Similar inferences were invited by the defence counsel in *Elliot*. The complainant, Janey (who was in a relationship with another man at the time), and Cameron, the defendant, had met through friends and became attracted to each other. After a night of heavy drinking, the two had consensual sex, which Janey appeared to have immediately regretted, and told Cameron so. The next night he came to her house to socialise with her and her flatmate, Janey going to bed, still feeling the effects of the previous night and expecting Cameron would sleep on the couch if he chose to stay the night. She gave evidence that she woke up to him raping her. Janey's credibility was challenged on the basis that when reporting to the police that same day, she did not tell them about the consensual sex – not telling them until a year later (she says because she did not think it of moment to the rape she experienced).

During the cross-examination, counsel spent 50 minutes going over the details of the texts and conversations between Janey and Cameron leading up to the consensual sexual encounter, and only 20 minutes on the circumstances surrounding the alleged rape. In the defence closing in this case, the defendant was portrayed as someone interested in, and thoughtful about the complainant – a friend, not a rapist. A person who reasonably believed in her ongoing consent, despite her firmly expressed desire to just be friends. Again, there was nothing on the file to suggest any pre-trial discussion about the admissibility of the previous sex, and the permissible scope of questions about it. While this evidence is currently not subject to section 44(1), it is admissible only if sufficiently relevant. We consider that in both these cases there was not enough investigation into the existence of a legitimate purpose and use of the evidence.

We prefer the approach of the Supreme Court of Canada, in discussing the equivalent of section 44 in a recent decision regarding the admissibility of evidence suggesting that the complainant and the defendant were “friends with benefits”. While section 276 of the Criminal Code 1985, unlike section 44 currently, does govern sexual experience with the particular defendant, the decision of the Supreme Court is still of local importance as the touchstone of admissibility in either jurisdiction is still whether such evidence is “probative of consent or credibility”.<sup>114</sup> The majority of the Court specifically refers to the twin myths that should be rejected when determining the admission of such evidence:

113 This decision reinforces our view that limited use jury directions should be developed: see Recommendation 34 in Chapter Ten.

114 *Goldfinch v R* [2019] SCC 38 at [43].

*Consider the first myth: that a complainant's prior sexual activity may support an inference of consent in a particular instance. Rejection of this myth – and its link to relationships – is intimately connected to the modern understanding of consent ... Today an accused may no longer argue that consent was implied by a relationship: contemporaneous, affirmatively communicated consent must be given for each and every sexual act. Today, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required.*

While the requirement of “positive affirmation” has not been confirmed in Aotearoa New Zealand,<sup>115</sup> there is a requirement that consent must be given for “each and every sexual act”.<sup>116</sup> If that is the case, then previous sexual acts are irrelevant to the issue of consent, and we reject the notion that “relationship expectations” can provide grounds for a reasonable belief in consent,<sup>117</sup> in the face of clearly communicated unwillingness. The majority in *Goldfinch* noted that “general arguments that the sexual relationship is relevant to context, narrative or credibility”, will not render evidence of it admissible.<sup>118</sup> An extract from the majority's final comments is apposite with regard to the admission of the evidence in *Carter, Elliot* and *Roberts*:

[73] Evidence of sexual relationships must be handled with care in sexual assault trials.

[74] Where a trial judge is concerned that the jury may improperly speculate about past sexual activity, it may be helpful to give an instruction specifying that the jury will not hear any evidence about whether the relationship included a sexual aspect. The instruction should explain that the details of previous sexual interactions are simply not relevant to the determination of whether the complainant consented to the act in question. No means no, and only yes means yes: even in the context of an established relationship, even part way through a sexual encounter, and even if the act is one the complainant has routinely consented to in the past. Giving such an instruction would both reinforce the principles which guide a proper analysis of consent and mitigate the risk that jurors will rely on their own conceptions of what sexual activity is “typical” in a given relationship.

115 See Chapter Seven at 248.

116 *R v Adams* CA 70/05, 5 September 2005 at [48]; *Henry v R* [2019] NZCA 266 at [26]; *Hazelwood v R* [2019] NZCA 484 at [27].

117 Contra *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315, discussed further at 248.

118 *Goldfinch v R* [2019] SCC 38 at [65].

We support the development of directions on the legitimate use of such evidence.<sup>119</sup>

In the Pilot case of *Cropp* the complainant, Paige, gave evidence that she kissed the defendant (Jeremy) on two previous occasions, some time ago. She also gave evidence that she had said “no” to sex with him. One particular night (also eight or so months earlier) she had kissed Jeremy’s wife, Rikki, but when Jeremy then asked if he could have sex with Paige, Rikki got upset and Paige went home. In cross-examination, Paige strongly resisted the characterisation of what happened as a “threesome”. There was nothing on the court file about any consideration of the admissibility of any of this evidence.

Despite the lack of evidence of a “threesome”, the word was used, and that sexual interaction was referred to, a total of 17 times, in the closing argument for the defence. The closing began with defence counsel telling the jurors to put any thoughts of the immorality of threesomes out of their mind:

*But the reason I’m bringing that up and I’m bringing the threesomes up so early in my address is that I want you to please to put this in the forefront of your mind. Please don’t let that sway your assessment of the evidence. It may not be your cup of tea, it may repulse you, it may be something other people do. They’re immoral, how can anyone do that? And that’s perfectly fine if you think that, but please put those thoughts into an imaginary shoe box before you start your deliberations and don’t let those thoughts become part of your assessment of the evidence.*

This does not explain why the threesome allegation was mentioned 16 further times. Later in the closing, counsel said:

*Now once again, just because she participated in this threesome, just because she was sexually intimate and performed oral sex on Rikki, that doesn’t mean that later on, six months later, seven months later, she was consenting in the middle of the night with Mr Cropp. Not at all.*

We agree. So why was the evidence of her sexual experience with Rikki admitted? What was its relevance? Similarly, previously kissing the defendant we say was also irrelevant and “doesn’t mean that later on, six months later, seven months later, she was consenting in the middle of the night with [him]. Not at all.” This is all very troubling. The fact that Jeremy was attracted to Paige, and some months earlier had kissed her, is irrelevant to whether she consented *or* (we would say) to whether he had reasonable grounds to believe she was consenting. It is evidence of the context of the background to the alleged offending – but still needs to be relevant, and at least with regard to the evidence of kissing Rikki, should have been subject to section 44(1).

119 See Recommendation 34 in Chapter Ten. See also commentary on the scope of such directions in “Admissibility of sexual history evidence in rape cases” (5 July 2019) <https://blogs.kent.ac.uk/criminaljusticenotes/2019/07/05/admissibility-of-sexual-history-in-rape-cases/#>



The circumstances of *Cropp* are similar to a Canadian case discussed by Elaine Craig. The case did not proceed to trial, seemingly due to information about the sexual experience of the complainant, Patricia, which was given to the prosecution.<sup>120</sup> The defendant and his wife, and the complainant and her husband, had previously been sexually active as between each other – “had crossed the line”, in the words of defence counsel. Craig suggests that either Patricia withdrew her complaint, wanting to avoid questions focussed on the couples’ previous behaviour, or the prosecution determined that the evidence would be “too damaging to her credibility” and “the prospect of a conviction in the face of a complainant’s supposed promiscuity and transcendence of monogamous hetero-normativity was too remote”.<sup>121</sup> However, as Craig argues, such evidence would not have been admissible at trial, when the issue was whether Patricia was conscious and consenting to the sexual intercourse (the same issue as in *Cropp*):<sup>122</sup>

*The fact that these two couples had engaged in sexual activity together would not be admissible to challenge the complainant’s credibility about whether the sexual contact had occurred, or about whether she awoke to find the accused having intercourse with her. Nor would evidence of her prior sexual history be admissible for the purpose of inferring that because she had had sex with the accused in the past she was more likely to have consented to sex in this instance. In other words ... there was no permissible use for this prior sexual history evidence.*

We agree. Of course, in *Cropp*, there was no previous sexual intercourse with the defendant, only kissing, and not only was Paige in a medicated sleep in her own bed, there was evidence of Jeremy breaking into her house in the early hours of the morning in order to have sex with her. He was acquitted.

Given the admission of evidence of previous sexual experience (including “flirting”) with the particular defendant in three cases in the pilot study and four cases in the principal research without any apparent assessment of its relevance and purpose, we consider that reform of section 44 is overdue. We welcome the proposed extension to the section to cover sexual behaviour with the particular defendant,<sup>123</sup> as was proposed by the Law Commission in 1999, over 20 years ago.<sup>124</sup> It is clear to us that subjecting this type of evidence only to the requirements of relevance and sufficient probative value is not resulting in a robust analysis of appropriate purpose, use and admissibility.

120 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 49.

121 At 49.

122 At 50.

123 See clause 8 of the Sexual Violence Legislation Bill 2019.

124 New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 – Volume 2, 1999) at [C210].

### ***Conclusion: admission of evidence about the complainant's disposition in sexual matters***

The analysis of the case materials in the principal research and the pilot study leads us to conclude that:

- (1) There are inconsistencies across cases within both studies regarding which evidence is currently within the scope of section 44(1). Further, in some cases in both studies, evidence which was clearly within section 44(1) was not subject to the admissibility inquiry in section 44(3);
- (2) Evidence which was seemingly viewed as outside the scope of section 44(1) was often not clearly subjected to an inquiry into its purpose and use and consequently irrelevant or insufficiently probative information about the complainant's disposition in sexual matters was sometimes admitted. Such an approach was also evident across both sets of cases (particularly in relation to the complainant "flirting" with another man or the relationship status of the complainant at the time of the alleged rape);
- (3) In some admissibility decisions in which section 44(3) was considered, the heightened relevance test was held to be satisfied even when the evidence of the complainant's sexual experience with someone other than the defendant was only relevant to the challenging her credibility – which we consider to be counter to the policy of the rule. Analysis of other decisions to admit sexual history evidence exposed reliance on an impermissible link between consent on a previous occasion, with someone else, and consent to sex with the defendant. There were also some inconsistencies regarding the admissibility of sexual history evidence offered to bolster the complainant's credibility or to suggest lack of consent. All these issues with the application of section 44(3) were found in the cases in the principal research, but not in the Pilot cases;
- (4) The notice requirement in section 44A, which was only in force for cases in the Pilot, was not always adhered to, even when the relevance of the evidence at issue would have been apparent pre-trial; and
- (5) With regard to evidence of the sexual experience of the complainant ***with the defendant***, not currently governed by section 44(1), the evidence was often admitted despite it having, in our view, insufficient relevance to the issues of consent or credibility. This lack of clear attention to the application of sections 7 and 8 to such evidence was apparent in cases both in the principal research and in the pilot study.

As previously discussed, we support the current proposals to amend the scope of section 44(1) to include evidence of the complainant's disposition in sexual matters as well as evidence of the complainant's sexual experience with the particular defendant.<sup>125</sup> However,

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<sup>125</sup> The Law Commission's recommendations have been accepted by the Government: see above at [148](#).

we consider that the draft of the proposed legislative changes included in the Law Commission's report and in the Sexual Violence Legislation Bill 2019 do not, of themselves, address the issues arising out of this research. In particular, the reform to section 44(1) should clarify that other types of sexualised behaviour by the complainant (such as perceived "flirting" with, or kissing another person) is caught, as well as evidence about the complainant's relationship status, contraceptive use and pregnancies. We are also of the view that there needs to be legislative or appellate guidance on the ability of the prosecution to offer evidence of the complainant's disposition in sexual matters in order to respond to a challenge to their credibility or to bolster their credibility. We suggest that further guidance is also required to clarify when evidence of an absence of sexual experience of a particular kind has sufficient relevance to the issue of consent.

We also consider that the case management practices from the Pilot,<sup>126</sup> especially with regard to the identification of evidential issues pre-trial,<sup>127</sup> should be implemented in all trials concerning allegations of sexual violence.<sup>128</sup> However, we also note that the combination of the *Sexual Violence Court Pilot: Best Practice Guidelines* and section 44A of the Evidence Act 2006 (the notice requirement) did not result in all admissibility arguments and decisions occurring pre-trial. Early decision-making is much preferred, from a complainant perspective, given that it provides her with some clarity regarding the likely scope of questions, but it also allows for more thoughtful and considered arguments by counsel, less time-pressure for the judge and the ability for a pre-trial appeal.

Finally, given the range of approaches to the identification and application of section 44 that has been made apparent by these studies, in which we have analysed decisions that are otherwise unavailable to researchers, we recommend that all decisions concerning section 44 are transcribed as a standalone ruling in the case or pre-trial.<sup>129</sup> This should include decisions that conclude section 44 is not applicable to the evidence sought to be admitted. We are of the view that such an approach is of particular importance to allow for future researcher analysis of the operation of the legislative reform of section 44, especially given the impending repeal of section 202 of the Evidence Act 2006.<sup>130</sup>

126 <http://www.districtcourts.govt.nz/assets/Uploads/Publications/26a1ed789/Best-Practice-Guidelines.pdf>

127 Guideline 12.

128 The Chief District Court Judge expects that all jury trial judges will adopt the Pilot guidelines: <http://www.districtcourts.govt.nz/media-information/media-releases/14-august-2019/>

129 See also Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 338 (Recommendation 8.13).

130 The section currently requires the Law Commission to review the operation of the Evidence Act 2006 every five years. The repeal of section 202, which is favoured by the Government following the completion of the second review in 2019, means there will be no regular examination of the operation of the whole Act <https://www.beehive.govt.nz/sites/default/files/2019-09/Govt%20Response%20to%20Law%20Commission%20report%20-%20Second%20Review%20of%20the%20Evidence%20A....pdf> at 5.

## CHAPTER SIX

**ADMISSIBILITY DECISIONS IN ADULT RAPE CASES:  
OTHER RULES OF SIGNIFICANCE*****Introduction: rules and application***

This chapter begins with a focus on the admissibility rule in section 88 of the Evidence Act 2006, which is relevant only in “sexual cases” (adopting the definition from section 4 of the Evidence Act 2006). This discussion is followed by consideration of other rules of broader application that have a particular significance in the context of sexual cases, because of **how** they are applied, or because of how **often** they are applied in that context. Admissibility rules that have particular significance in sexual cases and are discussed in this chapter are: sections 7 and 8 (relevance and probative value); section 35 (previous consistent statements); section 37 (veracity evidence); sections 40 and 43 (propensity evidence) and section 25 (expert evidence).

As noted in the introduction to Chapter Five, sections 25 and 37 contain heightened relevance tests worded as inquiries into the substantial helpfulness of the evidence. Section 35 is an exclusionary rule with exceptions, with the effect that otherwise superfluous repetitive evidence gains sufficient relevancy if it is responsive to a challenge to the credibility of the complainant. Section 43 requires balancing of the probative value of the propensity evidence about the defendant (such as previous convictions) against its unfairly prejudicial effect – which is similar, but not identical, to the test for exclusion in section 8. The fact that all rules relate back to the Act’s purposes and principles (sections 6, 7 and 8) means decisions about the relevance of a piece of evidence must be carefully evaluated in the context of any critical assessment of trial process.

***Evidence of the complainant’s occupation***

Section 88 of the Act is the other section (along with section 44, discussed in Chapter Five) which **only** applies in sexual cases and **only** in relation to evidence about the complainant. It provides:

**88 Restriction on disclosure of complainant's occupation in sexual cases**

- (1) In a sexual case, except with the permission of the Judge,–
  - (a) no question may be put to the complainant or any other witness, and no evidence may be given, concerning the complainant's occupation; and
  - (b) no statement or remark may be made in court by a witness, lawyer, officer of the court, or any other person involved in the proceeding concerning the complainant's occupation.
- (2) The Judge must not grant permission under subsection (1) unless satisfied that the question to be put, the evidence to be given, or the statement or remark to be made, *is of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice*.
- (3) An application for permission under subsection (1) may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.

The section is a re-enactment of an aspect of section 23AA of the Evidence Act 1908, which came into force on 1 February 1986, following the recommendations of the 1983 *Rape Study*.<sup>1</sup> One of the aims of the package of 1986 reforms was to ameliorate some of the distressing impacts of giving evidence and to control the use and admission of irrelevant and character-blackening material. In addressing concerns about the privacy of the complainants,<sup>2</sup> the reforms introduced the requirement that the court be closed while the complainant gives evidence, and further, that “[n]o oral evidence ... be given, and no question ... be put to a witness, relating to the address or occupation of the complainant except by leave of the Judge”.<sup>3</sup> In order for evidence of address and occupation to be admitted, the judge had to be “satisfied that the evidence to be given or the question to be put is of such direct relevance to facts in issue that to exclude it would be contrary to the interests of justice”.<sup>4</sup> Section 87 of the Evidence Act 2006 (which came into effect on 1 August 2007) extended the control of information about a person's address to all proceedings, and section 88 re-enacted the admissibility rule regarding limiting admissibility of evidence of the occupation of a complainant in a sexual case.<sup>5</sup>

1 Warren Young *Rape Study Volume 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983).

2 At 127; Gerald Orchard “Sexual Violation: The Rape Law Reform Legislation” (1996) 12 *New Zealand Universities Law Review* 97 at 109.

3 Section 23AA(2)(c) of the Evidence Act 1908.

4 Section 23AA(3) of the Evidence Act 1908.

5 The slight change in the language of the admissibility test (“sufficient” compared to “such”) was viewed by Parliamentary counsel as updating the language, not changing its meaning.

Despite the rule controlling disclosure of complainant occupation having been in force since 1986, that is 24 years prior to the first case in the principal research (2010), our analysis of the cases shows that the rule is often breached. In 20 of the 30 cases in the principal research, the complainant was asked about, or gave evidence of, her occupation, or whether she was in employment or studying. In only two of these cases did a question about the complainant's occupation occur during cross-examination – in 16 cases the complainant was asked about her occupation by the prosecutor as one of the first of the questions in the complainant's examination-in-chief. In one case, the fact that the complainant was a sex worker was offered in evidence both by the prosecution and the defence. In the final case (of the 20), the complainant, during cross-examination, talked about her occupation as an explanation for some of her behaviour.

Section 88 does not differentiate between the complainant's occupation at the time of the alleged offending and her occupation at the time of the trial. We consider that the heightened relevance test should apply to both inquiries. In *Gamage*, for example, the complainant was asked during cross-examination, without objection, about her employment situation during both those periods of her life:

- Q: *Kelly. We've heard evidence from your evidential video interview –*  
 A: *Mmm.*  
 Q: *– that around about the time of this incident [when you were 16] you were obviously looking for work around the [suburb] area?*  
 A: *Yeah.*  
 Q: *And can I ask are you in employment now? What is it that you do now?*  
 A: *Full-time mum.*

The complainant, Kelly, had previously been asked her age at trial by the prosecutor during examination-in-chief – replying that she was 18.

The following interchange occurred during examination-in-chief in *Nash*:

- Q: *Ms Blackman, can you please tell us your full name?*  
 A: *My full name is Erin Blackman.*  
 Q: *And can you please tell us your date of birth?*  
 A: *[Day] of [month] [year].*  
 Q: *So, you are currently?*  
 A: *23 years old.*  
 Q: *Can you tell us if you are working?*  
 A: *Yes, [at a regional newspaper] which is the local paper for [place].*

Q: *And can you tell us what you were doing back in [year], were you working then?*

A: *I was working part time at [retail] but I was also studying as a student at [tertiary institute] in [city].*

Based on our reading of the complainant's evidence and our understanding of the defence argument, evidence that the complainant was employed **at the time of the alleged offending** arguably met the threshold for admissibility in seven of the 20 cases. These were cases in which the complainant and the defendant either worked together or the complainant met the defendant through a workmate. However, in most of these cases the actual details of the nature of the complainant's occupation need not have been disclosed in order for the full narrative of the alleged offending to be presented and understood. The two exceptions were *Kingsford* in which the complainant, a sex worker, was allegedly raped by a client,<sup>6</sup> and *Smythe*, in which the complainant was allegedly raped by a co-worker at the workplace and aspects of their interaction on the night were witnessed by other workmates. Therefore, in our opinion, in 18 of those 20 cases, information about the employment status of the complainant should not have been admitted.

These cases include two in which the complainant was unemployed at the time of the trial. Such evidence may transpire to be a relevant factor in terms of the complainant's (financial) ability to call a taxi to get home or avoid the defendant, but in our view, it is not a necessary question to ask so early in the complainant's evidence. Being required to give such an answer at a stage when the complainant is no doubt feeling anxious in an unfamiliar courtroom environment, and may well be embarrassed about her employment status, will not assist her comfort levels as well as being contrary to the law.

In *R v Morgan*,<sup>7</sup> the judge was asked to consider whether evidence about the complainant using money from her welfare benefit to buy methamphetamine was admissible, with the prosecution specifically referring to section 88 (as well as to the rules concerning self-incrimination). Palmer J held that being a beneficiary is not an "occupation" for the purposes of section 88, stating, however, that "there is a privacy interest in that status". In this case, the source of the complainant's money (with which she allegedly purchased methamphetamine) was irrelevant.<sup>8</sup> The fact that the complainant was a beneficiary was therefore inadmissible. We agree with this analysis.

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6 Information about the complainant being a sex worker must have relevance beyond the elements of the offence: "It is axiomatic that even were the complainant a prostitute, that fact alone could not provide a reasonable ground for him to believe she was consenting to sexual intercourse with him": *Liu v R* [2018] NZCA 627 at [31]. As part of the propensity directions in this case (concerning two complainants) the judge noted that the defendant's alleged propensity was a "tendency to act violently towards prostitutes and is callous towards their wellbeing and any objections they might raise ... including inflicting pain to their genitals, sexually violating them without consent, and detaining them against their will".

7 *R v Morgan (No 1)* [2016] NZHC 1427.

8 At [9].

There was one case in the principal research in which the judge was asked to rule on the admissibility of evidence of the complainant's occupation. This was at the request of the defence, who sought to ask the complainant her occupation during cross-examination and the prosecutor objected. After a discussion in the absence of the jury, in which the judge expressed some surprise at the scope of section 88, the judge ruled that the complainant could be asked about her occupation as it had relevance to consent and the defendant's belief in consent (the issues in the trial). The defence argument, accepted by the judge, was that as the complainant was in a management position at the time, she would be able to communicate clearly whether she was consenting:

*At the commencement of [defence counsel's] cross-examination of the complainant Crown counsel raised an issue and I stood the jury down and the witness and sat the Court in chambers. It emerged that there is a section in the Evidence Act that says that a complainant in a sexual case cannot be asked her profession. So, [defence counsel] asked for leave for the question he had already put. I am satisfied from his explanation that it is directly relevant to the issues in the case – he is not seeking to find out if the witness is still working at that job or [to] pursue it in any other way – and to suggest that it might be relevant to the two issues in the case – consent and reasonable grounds in belief in consent. Accordingly leave is granted.*

In our view, the evidence of her occupation (for the purposes of establishing consent), did not meet the heightened relevance test in section 88 and was inadmissible. Whether or not the complainant was employed in a position that required her to have good communication skills is irrelevant to whether she was able, or did, clearly communicate her lack of consent to having sexual intercourse to the defendant. Her particular employment clearly has no relevance as to whether the defendant had reasonable grounds to believe she was consenting to have sex with him.

During this admissibility discussion, there were comments made that the rule was specifically aimed at ensuring the occupation of sex workers was relevant to the issues at trial (consent or belief in consent). However, there is nothing in the legislative history, including the submissions to the Select Committee, which indicates the section was proposed to be limited in this way – nor was it the primary rationale of the reform.

In the Pilot cases the complainant was asked about her occupation in two of the 10 cases. In two other cases evidence about the complainant's place of work, and her role, was admitted without discussion. In a further case, it was clear from the questions about the complainant's age at the time of the alleged rape that she was still at school. This means that in half of the cases, the jury were informed about the nature of the complainant's work or whether she was a student at the time of the offence or the time of the trial. In no case was section 88 referred to, nor was a section 88 analysis or even a relevance inquiry undertaken. We consider that in none of the cases, with the exception of *Lowrie* in which the



context of the offending might have been hard to present without a reference to the fact that the complainant was a college student, was evidence of the complainant's occupation of sufficient probative value.

Our analysis of the current operation of the rules of evidence in adult rape trials has therefore exposed that a long-standing rule, introduced for the purpose of complainant protection, is ignored in practice. Crown counsel asked the complainant about her occupation in 19 of the cases in the principal research, and in 17 of those cases (90%) the evidence should not have been admitted. In the Pilot cases, the prosecutor asked about the complainant's occupation in two cases, but evidence of employment status was admitted in a total of five cases. We consider that in four of those five cases (80%), the evidence was inadmissible. Further, judges did not comment on the irrelevancy of that information or ask the jury to disregard it, even when the complainant appeared to be in some distress after having to disclose that they were not working or were an 18-year-old "stay at home mum" on a benefit.

In our opinion, extraneous and irrelevant information about the complainants, their age, lifestyle, age and number of siblings and number of children needs to be carefully controlled – through both section 88 and sections 7 and 8. Compiling a picture of the complainant, which may feed into negative judgements based on culture, race, class, socio-economic background or employment status, should be avoided unless such information has sufficient probative value to the issues at trial.

We recommend that prosecutors ask other kinds of questions at the beginning of examination-in-chief that do not result in evidence offered that is unfairly prejudicial to the complainant. Even though such questions, perhaps about who is there to support them, may be strictly speaking irrelevant to the issues at trial we suggest some leeway should be given, as it has been historically, in order to assist the complainant (or indeed any witness) to feel more comfortable about giving evidence. Further thought should be given, perhaps as part of the development of the proposed training programmes, as to what preliminary questions are appropriate in order to settle the witness, while avoiding those which may be viewed as trite or bemusing.

We also recommend that judges consider immediately directing juries to ignore evidence of a complainant's occupation (or the absence of one) when it is given in breach of section 88. Although research suggests that directions to ignore evidence may be ineffectual,<sup>9</sup> the issue of importance here is not only on the inadmissibility of the evidence, but the impact that disclosure has had on the complainant. Aside from the privacy interests involved, there is also potential embarrassment or shame attached to having to disclose the lack of an "occupation". When this evidence is given in response to only the second or third question the complainant is asked as a witness, we believe that the judge should intervene. A direction

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9 See for example Nancy Steblay and others "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis" (2006) 30 *Law and Human Behavior* 469; David Alan Sklansky "Evidentiary Instructions and the Jury as Other" (2013) 65 *Stanford Law* 407.

from the judge to disregard the evidence as irrelevant, advising that she should not have been asked the question and that her answer should be ignored, may go some way towards assisting the complainant to feel more comfortable continuing with her evidence. We suggest that such an approach is consistent with section 6 of the Act – obtaining the best evidence from a witness.

### ***Relevance and probative value: sections 7 and 8***

The fundamental preliminary inquiry for admissibility, regardless of the existence of any specific rule, is whether the evidence is relevant. The Act codified this requirement in section 7:

#### **Fundamental principle that relevant evidence admissible**

- (1) All relevant evidence is admissible in a proceeding except evidence that is–
  - (a) inadmissible under this Act or any other Act; or
  - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

In order for evidence to be relevant it need only have some (mere) “logical tendency” to prove or disprove something of consequence (or an issue in the proceedings).<sup>10</sup> However, to be admissible the evidence must also be legally relevant in terms of section 8 – that is, it must have sufficient probative value to outweigh the risk that the admission of the evidence will needlessly prolong the proceedings.<sup>11</sup>

The issues at trial in the cases in the principal research and in the pilot study were consent or belief in consent. Although the prosecution must also prove the other aspect of the required conduct for the offence (the *actus reus*) in section 128 of the Crimes Act 1961 (penetration of the complainant’s genitalia by the defendant’s penis), in the cases in our research this was not contested. The other main inquiry of significance is the credibility of the witnesses, in particular for the purposes of this research, the credibility of the complainant.

Evidence offered in adult rape cases that is not otherwise subject to a specific admissibility rule, such as sections 44 and 88 already discussed, or sections 25, 35, 37 and 43, discussed below, is admissible subject only to sections 7 and 8 (as informed by the purpose of the Act

<sup>10</sup> *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [7]–[8].

<sup>11</sup> *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49]; *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [20]; *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322 at [55].

in section 6). Most of the evidence offered as relevant to the issues in adult rape trials is governed only by sections 7 and 8. The application of these sections is usually only scrutinised as the precursor to the consideration of a specific admissibility rule, although a number of appellate decisions, including at Supreme Court level, have been decided only on an application of the relevance inquiry.<sup>12</sup> Unless an admissibility decision is appealed, the relevance of much evidence offered in adult rape cases cannot usually be publicly scrutinised given the closed nature of proceedings (when the complainant gives evidence). This research allows better understanding of what evidence is admitted, and on what basis, in adult rape trials, and the extent to which sections 7 and 8 are being consistently applied.

Rather than consider every piece of evidence offered on a case-by-case basis, evidence that is admissible subject only to sections 7 and 8 will be discussed in relation to categories or types of information. This analytical approach will not result in all evidence decisions being discussed, but provides information about the general types of evidence being offered in adult rape cases, and whether such evidence is admissible for the purpose for which it is being offered (to assist the assessment of the complainant's credibility). The categories of evidence are:

- ▶ Personal information about the complainant, such as age, family background, educational qualifications;
- ▶ The personal situation of the complainant's partner (such as employment, age, drug use, convictions or children);
- ▶ The complainant's prescription medication;
- ▶ Whether the complainant had a shower after the alleged rape; and
- ▶ The complainant's contact with the defendant after the alleged rape.

Other evidence that was admitted in some of the cases, such as the complainants' contraceptive choice; their possession and use of sex toys; and the number and ages of their children, we argue should fall within section 44 and discuss the relevance of such evidence in that section (above). We also discuss the admissibility of the complainant's previous convictions when considering propensity and veracity evidence, although evidence of convictions that does not amount to veracity evidence is subject only to sections 7 and 8 (as relevant to credibility). There is a further tranche of evidence that is (usually) specifically offered as relevant to consent or belief in consent, which will be considered as part of the discussion in Chapter Seven – including aspects of complainant behaviour, such as clothing choice, level of intoxication, physical or verbal resistance and type of interaction with the defendant. In this chapter, and in Chapter Eight, the focus is on evidence which is purported to have relevance to the complainant's credibility.

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<sup>12</sup> *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1; *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734; *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

### Personal information about the complainant (such as age, family background and qualifications)

Evidence about the complainant's address and occupation is subject to specific admissibility rules (sections 87 and 88). Other information about the complainant (leaving aside relationship and parental status – see the discussion under section 44 above) will be admissible if sufficiently relevant. Often this type of evidence is elicited during evidence in chief, but in our view is not always relevant. The question that is most often asked during examination-in-chief that we consider needs to be carefully considered concerns the age of the complainant at the time of the alleged offence and/or at the time of trial. Young or advanced age may have relevance to perception, memory, comprehension and life experience – but only as a generalisation.

In the 40 cases in this research, eight complainants were under 18 years old at the time of the alleged offence, but only one was under 18 at the time of the trial. The eldest complainant was 51 at the time of the trial.<sup>13</sup> In 19 cases in the principal research (in three cases during cross-examination) and five of the Pilot cases (in one case during cross-examination), the complainants were asked either their current age or date of birth. In four cases in the principal research and four Pilot cases (in two cases during cross-examination), complainants were asked their age at the time of the alleged rape. It is unclear what the relevance of this information was – although in some cases the closings disclose some argued use of the evidence:

*Her account of events in the witness box yesterday was consistent with what she said in the DVD. She's not changing what happened and she also didn't shy away from the difficult questions. Some of them were pretty personal about the self-harming, about the medication she was on, pretty difficult questions for anybody but even more so for a seventeen-year-old.*

On two occasions, the age of the complainant was coupled with information about her being a parent at 17 years old – presented at the very beginning of her evidence in chief. Information about a complainant being 16 years old and out drinking at bars or partying with friends while still at school creates an impression of the person, which may not always be favourable. While it may be difficult, if not impossible, to prevent admission of evidence about the complainant's age, such evidence still must be assessed for relevance – especially when it may be unfairly prejudicial or encourage negative judgements about the complainant's life choices.

In two cases in the principal research, the complainants were asked in examination-in-chief about their schooling – in both cases they left school with no qualifications, a fact that was clearly known by the Crown, presumably in order to make an argument about the

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13 See further information about complainant age in Chapter Two at [30](#).

complainants' intelligence or life skills. In one case (*Gamage*) the judge asked the complainant about her school qualifications – perhaps considered relevant in terms of the impact of the alleged offending that occurred while she was still at college:

Q: *Can I just go back to something, and it might help the jury. You were talking about going to apply for this job. You were 16 at the time that this all happened?*

A: *Mhm.*

Q: *How long had you been out of school for at that stage?*

A: *Um, I left school when I was about 14, I think, yeah –*

Q: *Right.*

A: *– I was having problems at school 'cos of my anxiety.*

Q: *So, did you obtain any qualifications at school?*

A: *No.*

Q: *So, when you left school did you go off and do any other courses?*

A: *Um, I went to [a tertiary provider] –*

Q: *Right.*

A: *– because of my anxiety, so, yeah. I went to [tertiary provider], so I did some correspondence.*

Q: *And in terms of your anxiety –*

A: *Yeah.*

Q: *– you said you were on medication?*

A: *Yep.*

Q: *Can you tell me what that was?*

A: *[Name of medication]*

Q: *And do you still need to take that now?*

A: *I stopped taking it when I was pregnant, so yeah.*

In this interchange, however, other pieces of (we suggest) irrelevant information were admitted – including how young the complainant must have been when she became pregnant and the name of her medication. Offering evidence about the complainant's family background, such as questions about the number of siblings a complainant has (*Devi*), also needs to be avoided unless sufficiently relevant. This type of information may be relevant in terms of a complainant's access to support or options to avoid or leave unsafe situations, but it may also carry the risk of the jury making unfair, and inaccessible to researcher, commentary and moral judgements about the complainant (even though they are directed to set aside feelings of sympathy or prejudice).

### **The personal situation of the complainant's partner (such as employment, age, drug use, convictions or children)**

In the majority of cases little evidence was offered about the complainant's partner at the time of the alleged offending. As previously discussed, the mere existence of a partner will often be irrelevant, as will the reasons for a subsequent separation. When other personal information about the partner is admitted it also will usually be irrelevant to the issues at trial, and sometimes unfairly prejudicial to the proceedings. This includes evidence that the complainant's partner was in prison at the time of the alleged rape (three cases in the principal research); is five years older than the 17-year-old complainant; is unemployed; or has children from a previous relationship. While an argument could be made that a partner who has been imprisoned for violent offending may provide a reason for a complainant to cover up a consensual affair, in none of the cases was the reason for imprisonment disclosed and so the relevance of this evidence remains unclear.

In most of these examples (all, but one, are from the cases in the principal research), the evidence about the complainant's partner formed part of the complainant's evidence in chief. When the complainant was asked for (irrelevant) personal information about her partner during cross-examination, there was usually no objection from the Crown. In our view, in only very exceptional circumstances would such information have any relevance to the issues at trial, or to the assessment of the complainant's credibility, and as such should not be admitted. If admitted, it is unclear what use the jury will make of such information, with a real risk that they will view the complainant less favourably and less of a "real" victim.

### **The complainant's prescription medication and information held by non-parties**

In nine of the cases in the principal research and in one of the Pilot cases (10 cases in total), evidence about the complainant's prescription medication was admitted. In eight of the cases the medication was prescribed for anxiety or depression. In five of these eight cases the fact that the complainant was on this type of medication was admitted, but not for any obvious purpose. In the other three cases, the effect of the medication on the complainants' actions and recall, especially when taken with alcohol, was explored at trial. Where the evidence suggested that the combined effect of the medication and alcohol would have impaired the complainant in some way, the evidence was used for two different purposes – either that the complainant was consequently unable to consent (an element of the offence), or that the complainant's account was unreliable as she had no clear memory of giving consent (credibility):

*Now as I have said it is undisputed that the complainant was affected by alcohol and possibly her pain relief medication. This evidence of course is relevant to the issue of consent and the issue of the reliability of her evidence. The Crown say the combined effect of alcohol and the drugs meant that she was asleep when the accused came into the room and in no position to consent or otherwise to his sexual advances. On the other hand, the defence argues the combined effect of alcohol and drugs means you need to treat her account of events with great caution. He submits that it is entirely conceivable she has simply forgotten significant parts of the night's events and later tried to rationalise her behaviour by simply saying that she was unable to recall because she was asleep.*

While the impact of a combination of (any) prescription drugs and alcohol was presumed in some cases, in others expert medical evidence was offered and was equivocal as to whether the effects suggested would have actually occurred:

*[T]he scientist from ESR,<sup>14</sup> gave her opinions based upon information presented to her. That information contained too many assumptions and variables for us to be sure. We can assume from the evidence that [the complainant] has a higher tolerance to alcohol than others, given her drinking pattern. We cannot even be sure that she took her pills that night.*

In *Cropp*, a Pilot case, the complainant had been prescribed five types of medication (including for depression), and the drugs and dosage were admitted by consent. However, at trial only the effect of medication for insomnia was indicated by the expert as having an adverse effect when taken with alcohol (to deepen the sleep) – rendering evidence about the other medications irrelevant. In this case, the fact that the complainant took an oral contraceptive pill was also admitted.<sup>15</sup>

In one case it was the medication for depression mixed with alcohol that was argued might have given the complainant hallucinations, undermining her reliability. While we did not have access to the expert evidence in this case (*Edwards*), the Court of Appeal referred to it:

*We note at this point that the complainant was taking medication [for depression] that could have side effects such as impaired clarity of thinking, confusion and possible hallucinations. The medical evidence was that these side effects could occur with or without alcohol and that people who are on the medication for a prolonged period of time like the complainant develop a tolerance for it.*

14 Institute of Environmental Science and Research (New Zealand). The New Zealand Police contract the Institute to do the majority of forensic testing as part of criminal investigations.

15 See Chapter Five at 139.

In this case too, therefore, the evidence was equivocal as to whether the medication would have actually had the effects suggested, which would have given the evidence sufficient relevance. Instead, in this case as in the majority of others, the jury are given information about the complainant's mental health that has insufficient relevance to the matters in issue, and only contributes to crafting an unfairly prejudicial picture. We consider that evidence about the complainant being on **any** medication, but particularly treatment for anxiety or depression, needs to be carefully assessed for relevance.<sup>16</sup>

Despite the concerns often expressed about the admission of evidence of a complainant's health records,<sup>17</sup> including confidential information about therapy,<sup>18</sup> and based just on our access to closing arguments, it seems likely that in none of the 40 cases was material held by a non-party, such as a therapist or Government department, was admitted, following judicially granted disclosure. However, as noted in Chapter One, further analysis needs to be done regarding the disclosure and admission of information gathered by a MEDSAC health professional, as well as from a complainant's GP or Family Planning clinician.<sup>19</sup>

### Whether the complainant had a shower after the alleged rape

While the fact that the complainant washed or showered after the alleged rape may well have relevance to explain the absence of certain forensic evidence, questions about showering tended to be asked for other purposes. Some defence counsel suggested that the complainant should have known to avoid showering if she really was raped (*Edwards*). However, in other cases the fact that the complainant did **not** shower was (also) used to suggest she was not raped (*Moss*):

**Q:** *You've described the distress you did, in not having a shower after the first alleged rape, haven't you? I won't go through that all again, but it was your evidence yesterday.*

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- 16 The wider context of mental health and vulnerability to sexual violence also needs to be considered. Not only are women with mental illness are up to five times more likely to be victims of sexual assault (see for example Hamid Khalifeh and others "Domestic and sexual violence against patients with severe mental illness" (2015) 45 *Psychological Medicine* 875), no study points to mental illnesses such as anxiety, depression or bipolar disorder being associated with false reports of rape: Sandra Newman "I've studied false rape claims" (2018) <https://www.vox.com/first-person/2018/9/18/17874504/kavanaugh-assault-allegation-christine-blasey-ford> Drawing on appellate authority, some commentators point out that the view that mere consultation with a medical health professional is indicative of complainant unreliability is based on a discriminatory belief: see Lisa Dufrainmont "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 *Queen's Law Journal* 316 at 333 (citing *R v Mills* [1999] 3 SCR 668 at [119]).
- 17 See for example Lise Gotell "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records" (2002) 40 *Osgoode Hall Law Journal* 251; Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance and Victim Blaming" (2010) 22 *Canadian Journal of Women and the Law* 397 at 405.
- 18 Elisabeth McDonald "Resisting defence access to counselling records in cases of sexual offending: Does the law effectively protect clinician and client rights?" (2013) 5 *Sexual Abuse in Australia and New Zealand* 12.
- 19 See Recommendation 4 in Chapter Ten.



A: Yes.

Q: *Even though that your – you’ve got ejaculate inside you and feeling somewhat uncomfortable, on your evidence.*

A: *I just rolled over and went to sleep sir.*

Q: *Because you weren’t raped.*

A: *I was raped.*

When a complainant does shower because she felt dirty or disgusting, this is used by the Crown to bolster the complainant’s credibility:

*Most significantly, the Crown says, is when she described how she felt after the incident when she was on the way to the police station. She said at [page], and you’ll have her transcript of her interview, “I felt really gross,” sorry, “I felt really upset, I felt gross.” Now this next part I suggest is not contrived. “I just wanted to have a shower and I just, ah, get him off me.” She wants to wash away what he’s done to her. (Gamage)*

*What else did she do the following morning? A couple of important little bits of evidence. She went and had a shower. She sat in the shower for a long time. Why did she do that? I mean you don’t normally hop in to the shower of a Friday morning and sit down there and stay there for a long time, do you? She did it because, as she said at [page], “She felt like she couldn’t clean herself.” And she mentioned that she felt disgusted. So if this is a false complaint, and if she happily had consensual sex, told him not to tell, and then later became concerned and made a false complaint, then that bit about the shower going and sitting there, feeling unable to get clean, is made up, isn’t it? It must be. It has to be. And so, you might want to ask yourself whether that seemed like a made-up detail, this angry disgusted feeling being unable to get clean. (Tait)*

In the Pilot cases, evidence of whether and when the complainant showered after the alleged offending was offered during evidence in chief in four cases without the purpose of this evidence being clear, although in two cases the complainant gives evidence of feeling the need to have a shower: “I had a long, long shower. I scrubbed my entire body, probably had like a good half an hour shower just scrubbing and crying in the shower”.

The fact of the complainant having a shower after the alleged rape was used, therefore, either to support her evidence *or* to challenge her evidence. While intuitively it might be thought that following a rape a person would want to immediately clean herself, not all those who have experienced unwanted sex will react in that way. There is, we suggest, not a sufficiently strong logical connection between the fact of showering and having been raped, of itself. In our view, in cases where, as in *Moss*, a complainant’s credibility is challenged because she did *not* immediately shower, a comment should be made in summing-up as part

of the recommended counter-intuitive directions.<sup>20</sup> That is, not all people will behave in the same way during or after being sexually assaulted, including choosing to shower or not.

### The complainant's contact with the defendant after the alleged rape

Counter-intuitive expert evidence about a child complainant's continued contact with an alleged offender is relatively regularly offered (to respond to an "intuitive" inference that a child who had been sexually abused would cease contact with the abuser).<sup>21</sup> No counter-intuitive evidence to this effect (or any other) was offered in any of the cases in the principal research or in the Pilot; however, the same propositions are put to adult complainants about the implications of their voluntary contact with the defendant after the alleged rape:

Q: *Well, it's not the sort of thing that perhaps we'd expect to happen if this man had raped you is it, that you'd go to his house?*

A: *Yes.*

Q: *Do you agree with that?*

A: *Yeah.*

Q: *That you went there?*

A: *Yep.*

Q: *And you, from what you've told us you obviously were happy to go there.*

A: *I wasn't happy to go there.*

Q: *But you didn't decline to go there?*

A: *No, I didn't.*

Q: *You didn't have to get in his car?*

A: *No. (Devi)*

...

Q: *And can you explain how come you and Lee went back to the house of Mason [the defendant]? Why did you do that Ms Hodson, after you say this man had raped you?*

A: *Just to see if Mason was still at his house.*

Q: *So you went back just to see if Mason was in his house, is that what you're telling us? (Lino)*

...

20 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110]; New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) Recommendation 21.

21 See for example *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [14(g)] and [41].

Q: *Well I'm just going to suggest to you, young lady, that it's a bit odd, isn't it, that a guy whom you say sexually offended against you and who you claim to have regarded as a result of that as a dick and an annoying person and also a bit weird as you've described earlier, that you would choose him to come to your rescue at 4 o'clock in the morning. Do you agree with me?*  
(Masters)

...

Q: *The next day, at [early morning] he, he Facebooked you and said, "Well that was fun, see you next time. Did you sleep well? Hope you don't get into too much trouble." Remember that?*

A: *I remember it.*

Q: *Yeah and you Facebooked him back, "Yeah that was a good night, smiley face. Soon as I got home I just crashed, haha, so tired."*

A: *Well I wasn't going to be acting like, or freak out about things and he would actually go, be angry and then he just go like, "Nah," and just be, like, it's complicated.*

Q: *But he wasn't, he was asking, he was saying it was a good night and you said yeah it was. There was nothing mad about it at all, nothing threatening was it? ...*

Q: *You could have just blocked him, you know, all you young ones know all about this Facebook stuff, you could have just blocked him instantaneously. Gone to the cops, got them to do it, I don't know, but you didn't. The conversation carried on. (Walters)*

When the complainant did have contact with the defendant soon after the alleged rape, the prosecution on occasion provided an opportunity to explain why that conduct occurred:

Q: *Did you hear from the accused again that night?*

A: *Yes. He texted me asking me if I was okay.*

Q: *Did you reply straight away?*

A: *I don't believe it was straight away but it was, I think, within an hour or so, I sent him a pxt of [an animal].*

Q: *Why did you send him a picture of [an animal]?*

A: *'Cos I didn't want to reply to his text about being okay, 'cos I wasn't okay but didn't want to tell him that because he knew where I was ... I just didn't want him coming near or sending any more texts or anything, so ...*

- Q: *At that stage had you decided what you were going to do?*
- A: *With regards to what happened?*
- Q: *Well, yes.*
- A: *No. I didn't know what to do. I wanted to just forget about it and just try and pretend that it never happened. (Carter)*
- ...
- Q: *Did he tell you what he wanted to talk to you about?*
- A: *No.*
- Q: *And what did you do?*
- A: *I got in the car.*
- Q: *What was going through your head when you got into the car? What were you thinking about?*
- A: *I was thinking I either get in the car or I walk the last 200 metres risking that he might know where I lived.*
- Q: *Why didn't you want him to know where you lived?*
- A: *I was afraid when he, once he that once he found out that he would come and look for me. (Devi)*

While the behaviour of the complainant after the alleged offending may often be an important part of the narrative, it must still be evidence that is relevant to the issues at trial. Evidence of contact with the defendant was used to challenge the complainant's credibility by suggesting if she really was raped, she would have ceased all contact. Both the defendant and the Crown reinforced this expectation of complainant post-event behaviour by either explicitly drawing this link (in cross-examination), or by giving the opportunity for an explanation or offering evidence of the complainant refusing to see or communicate with the defendant (in examination-in-chief). If evidence of contact, or lack of contact, with the defendant after the alleged rape is viewed as sufficiently relevant to the complainant's credibility,<sup>22</sup> we suggest that such evidence should be followed by a direction to inform the jury about the forensic value of such evidence – as part of a recommended counter-intuitive direction.<sup>23</sup>

22 Post-event contact may occasionally be relevant to consent or reasonable grounds to believe the complainant consented – for example, if the defendant apologises for his actions (*Carter*) or the complainant challenges him about what happened (*Sarkisian*). See further Chapter Seven at 307.

23 Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1; New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.50]; Lisa Dufrainmont "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44 Queen's Law Journal 316 at 349 (outlining the Canadian approach).

***Recent complaint evidence (section 35 of the Evidence Act 2006: evidence of previous consistent statements)***

The traditional rationale for the admission of recent complaint evidence arises from the historical expectation that a victim of sexual abuse would immediately raise a “hue and cry”. In the absence of such a response, it was presumed a later, delayed allegation was unlikely to be true and more likely to have been motivated by malice, blackmail or simply a change of heart. Given the significance placed on the existence of a “recent complaint” in the context of a sexual case, it was seen as just that such a complaint should be offered as evidence of consistency (and therefore credibility) of the complainant as an exception to the rule against narrative.

Despite receiving much attention from critics, who favoured a range of alternatives, including abolition, liberalisation and extension (to other offences), this common law rule of admission changed very little over time. The main requirement for admission was that the complaint must be made at “the first reasonable opportunity” to a person the victim would be expected to complain to. More latitude was given (especially in the case of complaints by children) with regard to “evolving” or “incremental” complaints, so that complaints to more than one person may be admitted if forming part of the same disclosure, linked by some degree of timeliness and similarity of content.<sup>24</sup>

The Law Commission’s reform in 1999, introducing a rule about the admissibility of previous consistent statements to apply in all contexts (not just rape cases), addressed the concerns that the recent complaint exception was discriminatory. This argument is made from two different positions: feminists argue that the exception operates to perpetuate the belief that complainants in sexual cases, usually women, cannot be believed on their evidence alone; others argue that it is an example of inappropriate paternalism, which benefits women and prejudices the defendant, who is usually male.

Since the Supreme Court decisions in *Rongonui v R*,<sup>25</sup> *Hart v R*<sup>26</sup> and *R v B* (SC 88/10),<sup>27</sup> academic commentators have been of the view that section 35 now places very few limits on the admissibility of “complaint evidence”, as compared to the common law rule:

24 Simon France (ed) *Adams on Criminal Law – Evidence* (online, Thomson Reuters) at [ED12.04].

25 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

26 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

27 *R v B* (SC88/10) [2010] NZSC 160, [2011] 2 NZLR 82.

- ▶ The complaint need not be recent – it just needs to be responsive to the challenge made;
- ▶ The complaint need not be offered in evidence by a person other than the complainant;
- ▶ The triggers in section 35(2), which initially appeared to make the section significantly stricter than at common law, can seemingly be met relatively easily, and may even be met before trial, so that the complaint may be introduced as part of the complainant’s evidence in chief; and
- ▶ The complaint can be used to prove the truth of its contents, not just bolster the complainant’s credibility.<sup>28</sup>

As a result of these decisions, concerns that had previously been expressed about the scope of the section (particularly with regard to “recent complaint” evidence)<sup>29</sup> and the practical difficulties of calling a complaint witness have largely been addressed.<sup>30</sup>

The Evidence Amendment Act 2016 added two further exceptions to the rule, allowing evidence of the “mere fact of complaint” and when the statement forms part of the events at issue, as well as changing some wording to reflect appellate jurisprudence:

### 35 Previous consistent statements rule

- (1) A previous statement of a witness that is consistent with the witness’s evidence is not admissible unless subsection (2) applies to the statement.
- (2) A previous statement of a witness that is consistent with the witness’s evidence is admissible if the statement –
  - (a) responds to a challenge that will be or has been made to the witness’s veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
  - (b) forms an integral part of the events before the court; or
  - (c) consists of the mere fact that a complaint has been made in a criminal case.

The addition of “will be”, regarding the challenge to the complainant’s accuracy, indicates that the Supreme Court’s approach in *B (SC114/2010) v R* is to be preferred,<sup>31</sup> where possible.

28 However, see the discussion of a “repetition” warning in Chapter Nine at 412.

29 See E W Thomas “The Evidence Act 2006 and women” [2008] New Zealand Law Journal 169.

30 See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV35.04].

31 *R v B (SC88/10)* [2010] NZSC 160, [2011] 2 NZLR 82.

Judicial control on the type and number of a witness' previous consistent statements that can be admitted under section 35 requires an interpretation of the extent to which the evidence responds to a challenge triggering section 35(2).<sup>32</sup> The removal of "necessary" by the Evidence Amendment Act 2016 was said by the Ministry of Justice to be a consequence of the addition of the words "will be".<sup>33</sup>

*In cases where the statement is admitted in anticipation of a challenge to the witness's evidence, it may be difficult to determine whether certain parts of the statement should be excised. Further, in cases where the statement is admissible as an integral part of the events before the court, it may accord with the rationale of the amendment to allow the fact-finder to understand the statement in its full context. In cases where parts of the statement are irrelevant or unfairly prejudicial, the general rules of admissibility in sections 7 and 8 will apply.*

The issue of what "quantity" or "volume" of previous consistent statements will be admitted was raised in *Reti v R*.<sup>34</sup> Reti, a taxi driver, was convicted of rape and unlawful sexual connection for the assault of a young woman he took home in his taxi. Sexual activity was admitted and the issue at trial was consent. The defence case was that the complaint was false and motivated by regret. In order to meet this challenge to the complainant's credibility, the prosecution led previous consistent statement evidence from two sources: first, the woman to whom the complainant complained soon after the assault (which the Court characterised as "classic 'recent complaint'" evidence); and secondly, a series of text messages sent by the complainant to various persons following the incident.<sup>35</sup>

The Court rejected Reti's submission that the Crown was limited to relying on the evidence of the woman to whom the complainant complained. In the circumstances of *Reti v R*, the additional previous consistent statements found in the text messages responded to the "affirmatively and firmly put" claim "that the allegation was made up". Given the strength of the challenge, "[t]here was no excess of prior consistent statements such as might give rise to a concern of disproportionality."<sup>36</sup>

32 In *B (SC114/2010) v R* [2011] NZSC 64 at [8]–[9] the Supreme Court upheld the admission of the evidence of a second complaint, although noting that some of the detail "surrounding the complaint to NB went beyond what was necessary to respond to the allegation of recent invention".

33 Ministry of Justice advice to the Select Committee, 15 October 2015 at [33(b)]. [https://www.parliament.nz/resource/en-NZ/51SCJE\\_ADV\\_00DBHOH\\_BILL63043\\_1\\_A448977/77f84d113aeb66865f5ba8f318396f17891894e](https://www.parliament.nz/resource/en-NZ/51SCJE_ADV_00DBHOH_BILL63043_1_A448977/77f84d113aeb66865f5ba8f318396f17891894e)

34 *Reti v R* [2017] NZCA 602.

35 At [18]–[19].

36 At [17].

### Admissibility of previous consistent statements in the comparative research

In this research we did not have access to the evidence of other prosecution witnesses, so our comments about the admissibility of previous consistent statements are based on material in the complainant's evidence, including during cross-examination and re-examination, and, on occasion, from admissibility rulings. We cannot be sure how often the complainant was permitted to give evidence (as part of her evidence in chief) of the **content** of the first complaint she made – particularly in the seven cases from the principal research and four Pilot cases in which an evidential video interview (EVI) was played as part of the complainant's evidence in chief (which we did not have access to). In one of the cases in the principal research it was also not apparent from the complainant's evidence or the closings or summing-up what, if any, complaint evidence (as to content) had been given, and by whom (*Devi*). However, subject to those caveats, in the clear majority of cases (in both studies) recent complaint evidence (meaning evidence of the **content** of a previous consistent statement), was offered during the complainant's examination-in-chief.

	Evidence of complainant's previous consistent statement offered by complainant during evidence in chief	Evidence of complainant's previous consistent statement offered by complaint witness	Evidence of complainant's previous consistent statement offered by complainant in re-examination	Unknown who, if anyone, offered evidence of the content of complainant's first complaint
Principal research n=30	13	8	1	8
Pilot cases n=10	5	1	0	4

In five cases from the principal research (one from 2010, *Vandenberg*, and four from 2013) and in one Pilot case (*Junn*, 2018) there was a record of an admissibility decision regarding the offering of a complainant's previous consistent statement. In three of the principal research cases (*Ahmed*, *Depak* and *Vandenberg*) a ruling was given that a complaint witness called by the Crown would be permitted to give evidence of the content of what the complainant told them. In two cases, the judge permitted the complainant to give evidence of what she had told her friend during examination-in-chief, as it was clear that there would be a relevant challenge (*Patel* and *Junn*). In *Ihaka* permission was given for the prosecution to offer evidence of the content of the complainant's first statement to the police about the alleged offending during re-examination.

In no cases, therefore, based on the information available, was evidence of a previous consistent statement ruled inadmissible. Of significance is that in **all** 40 cases evidence of the fact, timing and receiver of the first complaint was admitted. Information about the timing of first complaint was compiled – establishing that in 35 out of 40 cases (88%) the complainant



told someone about the alleged rape within two days. In 30 cases (75%) the complainant told someone within 12 hours of the alleged rape, and in 16 cases (40%) the complainant told someone immediately afterwards. Combining all 40 cases, there was a delay of more than two days in only five cases (12%), and in only two cases was the delay longer than a week (5%).

	Immediate complaint	Complaint within 12 hours	Complaint within 1–2 days	Complaint within 3–4 days	Complaint delayed by a week or more
Principal research n=30	13	9	3	3	2
Pilot cases n=10	3	6	1	0	0

These percentages may be a consequence of prosecutorial decision-making – that is, lack of delay has forensic value for the prosecution case and therefore to the decision to prosecute – but this information of itself seems counter to the content of some expert evidence that has been offered in the context of adult rape cases:<sup>37</sup>

*Reading of the research literature as well as my own professional experience has indicated that reporting of sexual offending by adult and child victims is most commonly delayed if it's reported at all. However, it's important to say that timing of a complaint does not assist us in determining its credibility because false complaints may be immediate or delayed and true complaints may be immediate or delayed.*

Given the immediacy of reporting in many of the cases, it is unsurprising that a jury direction that there may be good reason for delay (section 127) was not given in the majority of both cases.<sup>38</sup> It is also unsurprising that there were very few cases in which the complainant's evidence was challenged on the basis of delayed complaint (three in the principal research, none in the Pilot cases). What did occur in many cases, however, was a challenge to the complainant's evidence on the basis of the **content** of her first complaint,<sup>39</sup> or her choice of **whom** to complain to. Neither of these are matters which are currently addressed by the Act, but may form part of counter-intuitive expert evidence informed by the social science research on the dynamics of evolving complaints and the expected recipient of a complaint.<sup>40</sup> However, as discussed below, counter-intuitive evidence seems to be very rarely offered in adult rape cases.

37 HKR (CA792/2012) v R [2013] NZCA 372, [2013] NZAR 1202 at [7] (emphasis added).

38 See further Chapter Nine at 405.

39 For example, as occurred in *Wilde, Redmond, Vandenberg, Kingsford, Smythe*. See further Chapter Eight, regarding evidence of inconsistencies.

40 See further Chapter Nine at 411.

### Challenges based on delay or recipient of complaint

In a number of cases (11 in the principal research and four in the pilot study), the complainant was asked, during cross-examination, to explain why she did not talk to the police earlier than she did – that is, the focus of the challenge based on delay was related to the timing of police involvement, rather than the timing of the first complaint. The implication being (see the following three examples) that something as serious as rape should be reported to the *police* immediately (if it has actually happened):

Q: *Right and then you had your interview [with the police] on the [date]?*

A: *Yes.*

Q: *So, that's about six weeks later?*

A: *Well I was still confused and scared and ...*

Q: *Confused about what though – whether something had taken place?*

A: *Well it's just a lot to take into and after that you just get scared and you don't know whether or not you have the ability to – or you know, whether or not I was strong enough to ...*

Q: *So, before you went to the police, you'd seen a counsellor for how long?*

A: *Um, I don't remember but I had been seeing her for a few months after that as well.*

Q: *If you'd gone to the trouble of telling all your friends the next day, why didn't you go to the police the next day?*

A: *I was scared.*

...

Q: *Is it more a case that you were embarrassed about the way in which you consensually put yourself into that situation and allowed things to happen?*

A: *I did not allow things to happen.*

Q: *Being forced down onto the bed and having a man's erect penis shoved into your anus without lubrication must have been a pretty terrifying experience?*

A: *Excruciatingly painful, yes.*

Q: *Why didn't you go to the police?*

A: *Because I just wanted to forget about it and move on with my life.*

...

- Q: Now after this sexual encounter which you now say was rape you didn't go to the police straight away did you?
- A: No.
- Q: But you could have quite easily have gone to the police station in [road], which is not that far from [road]. Do you accept that?
- A: Okay.
- Q: You know where the [town] police station is?
- A: Yeah.
- Q: So, you could have gone there that night and made a complaint?
- A: Yeah.
- Q: And that would have been useful wouldn't it because [of] the fresh forensics, [the defendant] was in the area. The police could have gone and nabbed him. They could have tested your clothes and all that type of thing. Do you accept that?
- A: Yeah.
- Q: But you elected not to do that didn't you?
- A: No. Didn't want to do that.
- Q: You didn't want to do that. What you did do, you went back to the party at [suburb] didn't you?
- A: I went back to a bed there.

In four cases in the principal research the complainant was asked to explain the delay in reporting to the police during evidence in chief or in re-examination, for example:

- Q: It was the end of [month] that you first spoke to the police about this incident?
- A: Yes.
- Q: About two weeks after you spoke to [your partner] about it, is that right?
- A: Yes, that was at [place] police station.
- Q: And could you just explain to the jury why it was that you waited for that period of two weeks before going to the police? ...
- A: Because we were staying in [rural town] and [rural town] police station was closed. Every time when we go for a walk to do a complaint it was closed, it had only a police station's number so we thought it's going to open now or now, but then we made up our mind that, let's go to [bigger town] and do it. (Langley)

...

**Q:** *During your interview you said, “I didn’t go to the police because I thought they had better things to do than to listen to me”, can you just tell us what you meant by that?*

**A:** *Well, as I said, they’ve got other things to do, um, other cases, worse off cases than mine to have to deal with. (lhaka)*

In nine other cases in the principal research (none in the pilot study), complainants were challenged as to why they did not tell a particular person, which would have amounted to a more immediate complaint (essentially the first person that the complainant spoke to after the alleged rape). Options put to the complainant included: her flatmate; a work colleague; a taxi driver; and a known or unknown person at the party, bar, social event or place where the alleged offending occurred.

Given the challenges to the complainant’s choice of whom they first complained to and the delay between event and report to the police in these cases, combined with the absence of counter-intuitive evidence on this point, we recommend either amending section 127 of the Evidence Act 2006, to add references to these matters, or that such information forms part of the proposed counter-intuitive directions.<sup>41</sup>

### ***Propensity evidence about the defendant***

The inadmissibility of the two defendants’ previous convictions in a high profile rape case – and significant public disquiet at that inadmissibility – was one of the catalysts for further research into the current operation of the criminal justice process, including the rules of evidence, in sexual cases.<sup>42</sup> One of the pieces of work undertaken as a result of governmental response was the Law Commission’s report *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character*.<sup>43</sup> The Law Commission, after reviewing the comparable legislation in other jurisdictions, did not recommend any changes to the rules governing veracity or propensity evidence in the Act and concluded that more time was needed to see how section 43 (which governs the ability of the prosecution to offer propensity evidence about a defendant) would operate in practice.

In April 2010 the Law Commission followed up its May 2008 Report with a letter from the then President, Sir Geoffrey Palmer, to the then Minister of Justice, Simon Power, which included the following statement:<sup>44</sup>

41 Chapter Nine at 411. See Recommendation 47 in Chapter Ten.

42 “Police sex trial: What the jury never knew” *New Zealand Herald* (Auckland, 1 March 2007).

43 New Zealand Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character* (NZLC R103, 2007).

44 Letter from Sir Geoffrey Palmer to Hon Simon Power “Regarding the Evidence Act Review: Operation of the Veracity and Propensity Provisions” (1 April 2010) at [83].

*As with veracity, we have reviewed all the cases we were able to obtain in which the propensity provisions have been applied. The approach the courts are taking to section 43 is very much a case by case fact-specific balancing exercise. That is the approach the Act requires and, in our judgement, as with veracity, the right evidence is being admitted or excluded, as the case may be. This indicates to us, that, when applied, the provisions are working.*

The Minister agreed, on 22 April 2010, with the Commission's recommendation that no urgent legislative amendments were required and that any further work would be deferred until 2012 when the Commission was due to report on the operation of the Act pursuant to section 202 of the Act. No amendments were proposed regarding sections 40–43 of the Evidence Act 2006 in either the 2013 report on the first review of the Act, or in the 2019 report of the second review of the Act.

The issue of non-disclosure which caused concern to members of the public occurred in the context of a trial that did not involve “real rape”. In cases involving an allegation of rape by a stranger, the issue in dispute is more likely to be denial or identification. Where identification is the issue, if the defendant has prior convictions for similar offending, or has behaved in a similar way on another occasion, and denies responsibility, it is highly likely that evidence of the previous convictions will be admitted. In adult rape cases in which consent and credibility are at issue, not identification, it is also unlikely that any prior convictions will meet the test for admission under section 43.

The reason for this is the operation of section 43(2), which requires identification of “the nature of the issue in dispute” in order for the judge to assess the probative value of the propensity evidence. If the issue is about whether or not the complainant consented, or whether or not the defendant had reasonable grounds for believing she consented, to the sexual encounter, it has proved difficult for the prosecution to admit evidence of the defendant's conviction for the sexual violation of another woman, in the absence of him denying his involvement in the later incident. Even where the previous conduct or offending is viewed as having relevance to the issue of consent, as opposed to amounting to evidence of “mere propensity”,<sup>45</sup> the evidence will not be admitted in the absence of sufficient similarities between the two incidents.

### **The admissibility of propensity evidence about the defendant in adult rape cases**

Propensity evidence is being admitted in adult rape cases, although relatively rarely.<sup>46</sup> In the absence of a denial that anything occurred or that the defendant is not the kind of person

<sup>45</sup> *Freeman v R* [2010] NZCA 230 at [24].

<sup>46</sup> One example is *R v Franklin* HC Christchurch, CRI 2009-061-537, 30 October 2009 at [26], when the issue was defined as “whether or not the accused raped the complainant” in a situation where the accused made no statement to the police and did not give evidence at trial.

that would commit rape,<sup>47</sup> it is difficult to mount an effective argument that evidence of previous convictions, or of other similar “bad” conduct, has sufficient relevance to the charge under consideration. For example, as stated in *Vuletich v R*,<sup>48</sup> where the issue is reasonable belief in consent, the evidence must demonstrate a propensity to disregard or be indifferent as to whether there was consent, presumably in similar circumstances.

Where the issue is identified as being consent or reasonable belief in consent, short of the court being able to identify other issues, or more precisely to frame the issue, it is less likely that propensity evidence will be admitted.<sup>49</sup> In order to more precisely define an issue, the court must be capable of identifying some unique or similar features between the alleged offending and the propensity evidence. Thus, in such cases the barrier to admission is two-fold. First, in most cases involving adult rape, the issue is likely to be consent or reasonable belief in consent. Due to the broad nature of this issue, it is unlikely that any evidence of other non-consensual conduct or convictions will be admissible. Second, even if the court does find such evidence to be relevant to the issue so broadly defined, it may still be excluded on the basis of the dissimilarities. Indeed, the reason why the court is unlikely to be able to further define the issue is due to the lack of connection between the evidence of previous conduct and the alleged offending.

However, in *Yang v R* the Court of Appeal agreed with the District Court Judge’s pre-trial ruling as to joinder that “the evidence of each complainant is probative of a tendency on Mr Yang’s part to engage in sexual conduct toward a victim in the absence of consent or grounds for a reasonable belief in consent”.<sup>50</sup> The Court held (at [17]):

*On both narratives, the offending has the same quality of opportunism; Mr Yang seizes the opportunity of the complainant’s presence in his house while his partner is away. In both cases, there is the same bold, even brazen quality to the offending, with Mr Yang sexually offending against the women in circumstances utterly inconsistent with the existence of consent. On the complainants’ account, there was nothing before either attack which might have suggested to Mr Yang that his attentions were wanted. The 2017 complainant verbally and physically resisted. The 2014 complainant was unconscious. Both accounts involve Mr Yang, at some point, approaching the complainant while unconscious – one because she has passed out drunk and the other because she is asleep.*

47 See *R v Sharma* [2009] NZCA 23.

48 *Vuletich v R* [2010] NZCA 102 at [36].

49 See further Stephanie Bishop and Elisabeth McDonald “What’s in an Issue? The Admissibility of Propensity Evidence in Acquaintance Rape Cases” (2011) 17 *Canterbury Law Review* 168.

50 *Yang v R* [2018] NZCA 90 at [16].

More recently, appellate courts have been willing to define the issues at trial in sexual cases as including the credibility of the complainant. In a 2017 case, the Court of Appeal disagreed with the trial judge's view that a previous admission by the defendant that he had indecently exposed himself in a park (to girls aged 12 and 13) was inadmissible propensity evidence for a charge of sexual violation of a girl under the age of 12 years.<sup>51</sup>

*We disagree with the Judge's decision to exclude the evidence on the charges of sexual violation of A. The issues in the sexual violation charges will be whether the offending occurred and the credibility of A; in the indecency charges the issues may be both credibility and the intent to expose. The sole basis for the admission of propensity evidence is that it shows a propensity – tendency – to behave in a particular way or hold a particular state of mind that can be linked with the behaviour or state of mind alleged to constitute the relevant offending.*

See, similarly, regarding the identification of complainant credibility (in a sexual case) as the issue at trial: *T (CA165/2018) v R*,<sup>52</sup> and *Bunting v R*.<sup>53</sup>

### Evidence about the defendant's previous conduct that falls outside section 43

#### (1) Propensity evidence offered for a non-propensity purpose

Despite the breadth of the definition (which refers both to a person's actions and their state of mind), in some cases evidence about a defendant's previous conduct, or state of mind, has been held to fall outside section 40(1) and admissible subject only to sections 7 and 8.<sup>54</sup> Such decisions seem in contradiction to the view expressed by the minority of the Supreme Court in *Mahomed* that "evidence which tends to show a propensity by the defendant to act towards or think about the defendant in a particular way is necessarily within the definition of 'propensity evidence' irrespective of *why* the Crown wishes to lead the evidence."<sup>55</sup>

The Court of Appeal's decision in *Perkins v R* is cited in support of the argument that evidence of the defendant's previous conduct towards a complainant is not always propensity evidence<sup>56</sup> – such as when it is relevant not as "orthodox similar fact" evidence,<sup>57</sup> but rather to explain the complainant's behaviour when it is seemingly "otherwise inexplicably passive in

51 *R v O (CA465/2017)* [2017] NZCA 472 at [7].

52 *T (CA165/2018) v R* [2018] NZCA 303 at [16] and [22].

53 *Bunting v R* [2018] NZCA 602 at [19].

54 *Nand v R* [2015] NZCA 521; *T (CA871/2012) v R* [2015] NZCA 83; *R v Paewhenua* [2017] NZHC 1773 at [50]; *Hastings v R* [2015] NZCA 180 at [29]; *A (CA237/2015) v R* [2016] NZCA 134 at [38]; *Donald v R* [2017] NZCA 120 at [11]; *R v Beazley* [2015] NZHC 2723 at [24].

55 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [61] (emphasis added). See also *R v M* [2017] NZHC 184 at [16].

56 The language "relationship propensity evidence" is sometimes used: see *R v Coe* [2018] NZHC 502 at [31].

57 *Perkins v R* [2011] NZCA 665.

the face of the violence”.<sup>58</sup> In *Perkins*, which primarily dealt with the nature of the trial judge’s directions, the Court seems to treat relevant background evidence offered to support the complainant’s evidence as falling outside the definition of propensity evidence.<sup>59</sup> The inquiries as to the probative value of the evidence contained in section 43(3) are also of limited efficacy when the propensity evidence is not dependent on coincidence reasoning for its probative force.<sup>60</sup>

In *H (CA227/2018) v R*, the defendant was charged with sexual offending against two of his stepdaughters.<sup>61</sup> Both he and his wife had previously pleaded guilty to several charges of quite serious neglect (including locking the children in their filthy bedrooms) in relation to the girls and their siblings. The Court of Appeal upheld the pre-trial decision that evidence of the neglect convictions (and the facts of that offending) should be admissible without the need to apply section 43. The Court said:<sup>62</sup>

*We accept Mahomed is the starting point. That case held that notwithstanding the fact the challenged evidence involves the same complainant and defendant, the propensity rule was the correct analytical route. However, it is recognised that because the relevance of this type of contextual evidence is not sourced in linkage and coincidence, many of the section 43 factors will not be of assistance. The analysis will mirror that which would occur under sections 7 and 8 of the Act.*

Although also considering the factors in section 43 for completeness, the Court commented on the importance of admitting contextual evidence to assist juror understanding of complainant behaviour, without the need to effectively “shoe horn” the evidence in through the strictures of section 43:<sup>63</sup>

*We consider in cases of this type, a complainant should not be unfairly limited in giving evidence by artificial restrictions on what he or she can refer to. The alleged sexual abuse here occurred at a time when the girls were experiencing such treatment from their parents that is disclosed in the neglect conduct. When assessing the veracity of their complaints, including how they reacted to Mr H’s alleged sexual abuse and how likely it is to have occurred, a complainant must be entitled to explain, and a jury must be entitled to know, the dynamics of the household. Otherwise the case has an air of unreality.*

58 *Perkins v R* [2011] NZCA 665 at [22]. Cited in *Hastings v R* [2015] NZCA 180 at [28].

59 *Perkins v R* [2011] NZCA 665 at [24].

60 *R v Martin* [2013] NZCA 486 at [22]. See also *R v Ashby* HC Whāngārei CRI 2009-027-3088, 13 December 2010.

61 *H (CA227/2018) v R* [2018] NZCA 266.

62 At [11].

63 At [19].



In *Tahau v R* the Court of Appeal agreed with the pre-trial decision that evidence of the defendant telling the complainant (in a rape case) that he had just been released from prison for “bashing a nigger” was admissible subject only to sections 7 and 8.<sup>64</sup> The Court held that such evidence was probative to the assessment of the complainant’s credibility (as to why she did not call out during the alleged sexual violation) and not unfairly prejudicial.<sup>65</sup> The actual details of the defendant’s recent release from prison was not admitted. The Court was of the view that the directions as to use of the evidence, in which the trial judge said that “the only reason you heard about [the defendant’s] claim that he had been in prison before, was because the Crown put it to you that that was an explanation for [her] behaviour ... whether that comment he made was true or not ... is entirely irrelevant”, were sufficient to guard against any illegitimate prejudice.<sup>66</sup>

See similarly *R (CA89/2018) v R* in which the Court of Appeal agreed with the prosecution that the defendant’s viewing of pornography in the months proximate to the offending “was plainly relevant and probative of whether the complainant was telling the truth”.<sup>67</sup> No analysis of the information as propensity evidence was undertaken.

## **(2) Evidence of behaviour of the defendant which is an integral part of the complainant’s account**

In *Grooby v R* the complainant (R) gave evidence that she had been sexually assaulted by an older man (G) whom the family was staying with, acts which R said occurred shortly after G had attempted to have oral sex with her sleeping and heavily intoxicated father.<sup>68</sup> The Court of Appeal held that this evidence (of G’s sexual activity with R’s father) was “an integral part of her account”,<sup>69</sup> finding that although background of narrative evidence can fall within the propensity rules, “the disputed portion of R’s evidence is properly understood as her description of what happened to her rather than as background or relationship evidence and it did not fall to be considered under sections 40 and 43”.<sup>70</sup>

64 *Tahau v R* [2018] NZCA 538 (application for leave to appeal declined: [2019] NZSC 44).

65 *Tahau v R* [2018] NZCA 538 at [12].

66 At [15].

67 *R (CA89/2018) v R* [2018] NZCA 341 at [65].

68 *Grooby v R* [2018] NZCA 344.

69 At [23].

70 At [28].

### Admissibility of propensity evidence under section 43 in this research

In four cases in the principal research, consideration was given to the admission of propensity evidence about the defendant.<sup>71</sup> In two of these cases, the proposed propensity evidence concerned previous alleged offending (*Jacobs* and *Patel*) and the pre-trial admissibility decisions were both appealed pre-trial.<sup>72</sup> In one case (*Walters*), propensity evidence about the defendant was offered by the Crown, but no admissibility decision was on the court file. There was also no information on the court files regarding any section 43 applications in relation to any of the Pilot cases, however in one case (*Salah*), propensity evidence was given by a prosecution witness, who alleged that the defendant had raped her when she was eight years old.

The number of adult rape cases in this research in which propensity evidence was admitted is consistent with previous research that propensity evidence (in the form of previous charges or convictions) is less likely to be offered or admitted in the context of adult rape cases.<sup>73</sup> However, because we did not have access to material about the defendant's previous offending, if any, we are only in a position to comment on the cases in which the prosecution sought to offer propensity evidence about the defendant, and not on any propensity evidence about the defendant that was not sought to be offered.

In *Carter* the prosecution applied to offer evidence of an exchange of text messages between the defendant, Zachery, and an unknown woman which occurred later on the same afternoon on which the alleged rape occurred. The Crown argued that the proposed evidence was probative of the defendant's tendency to engage in forceful sexual activity without consent (with consent and belief in consent being the issues at trial). Zachery sent texts of a sexual nature (after the alleged rape) to an unidentified woman – one which stated “want it rough?”, the reply to which is “of course!” The prosecution was of the view that the exchange of text messages was relevant because not long after the sexual activity between Zachery and the complainant, Theresa, Zachery sent her a text message in which he stated: “Way too forceful, feel awful now”. The prosecution argued the text message to Theresa amounted to an acknowledgement on Zachery's part that the act of penetration was not consensual. The judge held that the “want it rough?” interchange was inadmissible because the exchange of

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- 71 This includes one case (*Kingsford*) in which a severance application was declined. However, we did not have access to the information relevant to this decision under our terms of access and make no further comment but note that propensity directions were given as part of the summing-up in this case. The case was unusual in our research as we had attempted to access only cases with single complainants – in this case (and in *Ihaka*, involving two complainants but no reliance on propensity reasoning) we only analysed the evidence in relation to one of the complainants.
- 72 As the focus of the research was on the evidence of the complainant, it may be that more examples of propensity evidence that was not subject to a section 43 analysis formed part of the testimony of other witnesses, but this material was not accessed as part of this research.
- 73 Stephanie Bishop and Elisabeth McDonald “What's in an Issue? The Admissibility of Propensity Evidence in Acquaintance Rape Cases” (2011) 17 *Canterbury Law Review* 168.

texts was initiated by the unidentified woman, who had stated “u shud cum ov 4 sex later on”, and so there was no issue about consent in that potential sexual encounter.<sup>74</sup>

There was, however, another ground for the admission of the evidence of the later texts (to the unidentified woman). In Theresa’s evidence she outlined a number of reasons why she did not want to have sex with Zachery that day, even though she invited him into her bedroom and they were kissing and talking. She met him online and had thought they would date exclusively (given they had had consensual sex earlier that week). She was concerned to discover he had not taken his profile down and was still seeking to hook up with other women. The fact that the very same day Zachery was actively pursuing other women is consistent with her evidence that, despite previously having had sex with him, Theresa no longer wanted to. While this is propensity evidence about the defendant, admitting it for a non-propensity purpose (to support the complainant’s evidence) should be permissible in our view when it provides context to the interactions between the complainant and the defendant and is supportive of her evidence about the fact of consent.

In *Jacobs* the defendant was charged with rape and kidnapping of a young woman, Sara. Pre-trial, a judge ruled that evidence of Caleb’s two prior convictions for abduction and rape of two other young women, was admissible. The Court of Appeal agreed that the evidence was admissible and relevant to Sara’s credibility and reliability, regardless of whether the issue at trial was consent or denial:

- [28] In his ruling, the Judge concluded that the two incidents were relevant and probative. They shared with the index incident a “journey, by whatever means, accompanied by a clear intention to engage in further sexual activity during the journey”. The “signature” linking all three incidents was “forced sex during abduction” ...
- [34] The issue at trial will be whether [S] is credible and reliable in her complaint that Mr [Jacobs] befriended her, only to assault, threaten and sexually violate her, and that he then, having held her in his home, abducted her across country. He may simply deny this or, if he elects to give evidence, may say it was consensual.
- [35] Evidence as to the two prior incidents and the convictions entered is unquestionably relevant to [S’s] credibility and reliability and we agree with the Judge that the proposed evidence, when assessed under section 43 of the Evidence Act 2006, is probative and not unfairly prejudicial.

We support this approach, in terms of categorising the issues at trial.

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74 This claim is debatable of itself of course – texting an invitation for a potential future consensual sexual interaction does not mean consent can never later be contestable.

In *Patel* the Court of Appeal did not agree with the judge's pre-trial decision that evidence of the defendant's acquittal on a previous charge of rape was admissible – as showing “a tendency, on the part of the accused, to befriend strangers and then isolate them physically in order to sexually offend against them”. In *Patel*, it was alleged that the defendant, Dinesh, had taken the drunk complainant (Lily) away from the nightclub where she was waiting for her friends, into an alleyway and raped her. The judge pointed out the similarities:

*On both occasions, the accused has befriended strangers. On both occasions, he has orchestrated a way to be alone with the women. On both occasions, the accused has then sexually violated the complainants in a way that includes vaginal rape and a question to both of them asking whether they are liking what he is doing to them ... When those matters are taken together, I am satisfied that the propensity evidence has significant probative value in relation to the issue in dispute, namely whether or not the complainant consented to the sexual intercourse that took place in the alleyway.*

The Court of Appeal accepted that a jury might agree that Dinesh possessed a relevant tendency but were not of the view that the probative value of the evidence was sufficient and that the similarities were “rather general”. Despite the Court's view that it is “somewhat more likely that [Lily] is giving reliable evidence that the sex with her was non-consensual when [Tracy] says that the same thing happened to her”, the differences were emphasised (such as that Tracy and Dinesh had met by agreement and the offending against Lily was more opportunistic). The Court concluded: “These different circumstances, together with the fact that the propensity evidence is based on one rather than multiple complainants, make the probative value of the propensity evidence moderate at best.” The Court was also concerned that the jury would be distracted by trying to determine if Dinesh had raped Tracy, and the use of court time potentially involved offering evidence of the facts of the previous incident (the judge pre-trial thought that issue could be managed).

The Court of Appeal decision in *Patel* does re-emphasise that when an allegation (or even a conviction) of previous, unexceptional or “unusual” sexual offending (to use the language of section 43(3)(f) of the Act) is offered as propensity evidence to establish lack of consent, it is unlikely to be admitted. However, when the issue is recast as being about the credibility and reliability of Lily, the unlikely coincidence of another woman, unknown to Lily, making an allegation of rape in broadly similar circumstances (which also proceeded to trial) has more probative value than the Court of Appeal in *Patel* seems to suggest.

In *Walters* alleged violent behaviour (which is denied) of the defendant towards the complainant on an earlier occasion was admitted. This was a claim made by the complainant in her EVI and there was no indication on the file of any admissibility decision regarding this evidence. The incident was also referred to during cross-examination:

- Q: *All right. And then you mentioned on the [EVI] that [the defendant] had hit you at some earlier stage at a youth group, I think you said?*
- A: *Yeah.*
- Q: *That's not true, is it?*
- A: *Yes, it's very true. I have witnesses.*
- Q: *I'm sorry?*
- A: *I have witnesses to that, that, that happened.*
- Q: *You have witnesses to that?*
- A: *Yes. Because one of the people that were there had to pull him off me so he didn't, like, severely injure me.*

The trial judge referred to the use being made of this evidence by the prosecution in the summing-up, indicating it was relevant to explain the complainant's behaviour at the time of the alleged offending, and so offered for a "non-propensity" purpose:

*Again, contextually, underneath this she had an underlying fear of him because he had physically attacked her at this youth group, I think a year and a half-odd before. She would never have gone if she thought she would be alone with him, and her experience explained why she froze and succumbed to the force that he subjected her to, why she complied, and why she was too scared to run away or even complain in the immediate aftermath.*

In the Pilot case of *Salah*, a propensity witness was called by the prosecution to give evidence that the defendant allegedly raped her when she was eight years old. There was nothing on the file regarding the admissibility of this evidence, so the only material available to us regarding its permissible use was found in the judge's summing-up:

*I want to talk now about what is called propensity evidence or coincidence, reasoning. The defendant, Mr Salah, faces an allegation from one complainant, Ms Sephton, but you've heard other additional evidence from Ms Rhodes that Mr Salah raped her when she was eight years old. The Crown highlights similarities between the evidence of these two women saying these similarities disclose a pattern of behaviour which make it more likely the defendant has committed the offence that you're dealing with in this trial. That is a legitimate argument but only if you first accept that these similarities, or a pattern, exist.*

*Here, the issue is whether these events, as described by the complainant occurred without her consent and whether the defendant, Mr Salah, had any reasonably held belief that she was consenting. The Crown highlights that in relation to Ms Rhodes the offending is effectively the same, namely that the defendant had intercourse with a girl in circumstances where she could not possibly have been consenting, a fact obvious to him. The Crown says that these similarities make it more likely the defendant has committed the offence charged in this trial.*

*They show that he has a tendency to act in a particular way, that is have sexual intercourse with females knowing that they weren't consenting. The defence contests this reasoning saying, "You simply cannot be sure that Mr Salah did rape Ms Rhodes so there is no comparison available to make." In other words, if you can't be sure that he did rape Ms Rhodes then there is no support for the present charge from her evidence.*

*First, you need to decide whether you are sure that the assault on Ms Rhodes did in fact happen. If you accept that it did then you need to ask yourselves a question, "Are we satisfied that that evidence now discloses a type of behaviour which reveals a tendency on the part of the defendant to act in a particular way?" In this case the Crown says that the proven behaviour relating to Ms Rhodes shows a tendency to have sexual intercourse where there is patently no consent. The defendant says it never happened so you should ignore it in your reasoning process.*

In *Salah* the complainant, Maria, who was 17 years old at the time of the offending,<sup>75</sup> gave evidence that she was too intoxicated to consent to sex and was not even sure who raped her. The defendant was interviewed close in time to the alleged rape and denied having sex with Maria. He was later identified by DNA evidence and in his next statement to the police claims the sex was consensual. The issue at trial was therefore consent.<sup>76</sup> The propensity evidence (that the defendant had allegedly raped an eight-year-old girl some years previously) was admitted as being sufficiently probative to this issue: "proven behaviours [of the defendant] showing a tendency to have intercourse without consent." In our view, given the comparative age of both complainants (without having access to further content of the earlier allegation, although it did not result in a conviction), the admissibility decision in this case seems at odds with that of the Court of Appeal in *Patel* (above).

### ***Propensity and veracity evidence about the complainant: sections 37 and 40***

In the context of adult acquaintance rape cases, propensity evidence offered about the complainant will usually be about her previous sexual experience (with someone other than the defendant) and subject to section 44, or if outside section 44, will be subject to sections 7 and 8 (even though falling within the definition of propensity in section 40) as there is no specific admissibility rule which applies. As discussed earlier, the Law Commission has recommended that the scope of section 44(1) be widened, and therefore the admissibility of evidence that is about the complainant's propensity (or disposition) with regard to sexual matters is considered in that section of this chapter.

<sup>75</sup> The defendant was convicted and sentenced to seven years and eight months imprisonment. We are not aware of any appeal at the time of writing.

<sup>76</sup> This Pilot case was a re-trial – at the first trial the jury was unable to reach a verdict.

Other propensity evidence about the complainant offered or admitted in the principal research cases related to her convictions. Such evidence is unlikely to be relevant to the issue of consent, so will be admissible (subject to sections 7 and 8) only if the convictions are relevant to the complainant's credibility or her veracity (subject also to section 37). In our view, *only* convictions that say something about the complainant's general dishonesty (and are, therefore, veracity evidence) should be admissible in this context. Convictions for other types of offending will rarely be relevant to the assessment of a complainant's credibility.

In two cases in the principal research, the complainant was cross-examined about convictions for driving with excess blood alcohol and dishonesty-type offending. Convictions related to drinking were argued as being relevant to assist in the assessment of the complainant's evidence as to how intoxicated she was at the time of the alleged offending. In *Harete*, for example, the complainant Hazel McKay had been drinking spirits with her friends and said she got very drunk quite quickly as she was not used to drinking – describing herself as “not a drinker”. Hazel's evidence was that in a very intoxicated state she started to walk home and was picked up by Hone, who raped her – but her memory of the events was patchy. During cross-examination this interchange occurred:

Q: *Ms McKay you're no stranger to alcohol, are you?*

A: *I'm not a drink – not really a drinker.*

Q: *2010 convicted of driving with excess breath alcohol limits?*

A: *Yep.*

Q: *And honesty and dishonesty, you have a bit of trouble with that don't you?*

A: *(no audible answer)*

Q: *What four convictions for dishonesty related offences – receiving?*

A: *One.*

Q: *Shoplifting?*

A: *Yeah.*

Q: *Several – three?*

A: *Yeah.*

Q: *Breaching a liquor ban?*

A: *Yeah.*

Q: *And your obligations to the Court don't very – mean very much because you've got a number of charges of breach of community work, haven't you?*

A: *Yes, I do.*

Q: *And then on – in 2009 you admitted to making a false statement to police, didn't you?*

A: *Yup.*

Q: *And that statement was to try and cover up for someone else's crime wasn't it?*

A: *My brother.*

This evidence was admitted without challenge and there was nothing on the court file to indicate there was consideration of the relevance of the complainant's convictions. In our view, having alcohol-related convictions does not necessarily undermine Hazel's evidence that she is not a drinker; it is equally consistent with Hazel being someone who becomes intoxicated easily. In any event, there was supporting evidence from Hazel's friends that she was very intoxicated on the night, making evidence of her drink-driving conviction, and the one for breaching a liquor ban, lacking in probative value, given the inherent prejudice. With regard to the dishonesty offences, without a context (and information about Hazel's age and situation at the time) it is hard to determine whether they were substantially helpful in assessing her veracity. Recent case law suggests that minor convictions like shoplifting, unless on multiple occasions, are unlikely to meet the threshold.<sup>77</sup>

In this case the defendant was also attempting to draw a link between breaches of a community work order and "obligations to the Court", presumably inferring a likelihood to lie. This use of the convictions renders them veracity evidence and inadmissible if not substantially helpful, which we consider they are not, in the absence of context.

In summing up, the judge's only reference to Hazel's convictions was the following:

*Finally, defence counsel reminds you that [Hazel McKay] herself has a reputation for dishonesty, alcohol abuse and non-compliance, which she frankly admitted when giving evidence and [defence counsel] submits that against that background you should be very careful indeed before convicting this man solely on her word.*

In our view, the reference to "reputation" is unfortunate and overstates the relevance of the evidence. It is also the last reference to the defence evidence in the summing-up.

A discussion in the absence of the jury about the admissibility of the complainant's convictions (including for breaching community work orders) occurs in *Yamada*, after the prosecutor's objection to questions about Grace's convictions for driving while disqualified:

**CROWN:** *Her previous convictions are there before you Sir. She has numerous driving convictions. I'm happy for the false details and where she has breached her driving while disqualified to be put to her but I don't think we need to hear that she drove carelessly or – but I think my learned friend is making his point and we don't need to troll through them all.*

**JUDGE:** *Two breaches of community work.*

<sup>77</sup> See for example *R v Katipa* [2017] NZCA 45 at [12]: "[O]ne, two or three offences of shoplifting may say little about a person's disposition to refrain from lying. But 10 such convictions, at regular intervals, may have a different effect."



**CROWN:** *I don't think they're particularly relevant Sir, because we don't know for what reasons those breaches are. You might breach community work for a reason but if it's not what probation accept as a good reason then you breach. Or sometimes it's just easier to plead just to get them out of the way.*

**JUDGE:** ***Well she is not a defendant is she, she is a witness and she can be asked about anything really.***

**CROWN:** *Well she can be Sir. But they have to be relevant as well.*

**JUDGE:** *Well I think breaches would be relevant so they can be put.*

We consider that the prosecutor makes a valid point concerning needing to know the context of the breaches before deciding about admissibility – on the basis that evidence of them can only be admissible as veracity evidence (as they are not relevant to assessment of the accuracy or reliability of the complainant's evidence in court on the particular event).

The second point worthy of discussion from this extract is the portion that is emphasised in bold – it is simply not the case that a complainant in a sexual case can be asked about anything. Not only must evidence of her convictions (or any previous behaviour) be logically relevant and sufficiently probative, the evidence must be lacking unfair prejudicial effect. However, at the end of this discussion it is agreed that the evidence of convictions must be limited to driving while disqualified and giving false information to the police – on the basis that both types of convictions are relevant to assessing Grace's veracity.

In summing up the judge in this case directs the jury that evidence of the convictions does, however, have relevance to the assessment of Grace's *credibility*:

*We have heard about [the complainant's] previous driving convictions and more particularly a conviction where she gave false details to the police. That would have been at the time she was stopped by the police because she was disqualified at the time. But obviously she was later convicted of both of the false details and the driving while disqualified. So, again this is relevant to the assessment of her evidence and as to her credibility and you heard her description of what she did as something that happened when she was younger, or certainly, a couple of years before these events. So, as I say, in both instances there is relevant material to consider but particularly in respect to the credibility aspect of your task.*

In our opinion, these types of convictions do not meet the test of substantial helpfulness in assessing Grace's veracity with regard to her evidence in the particular case. Her evidence is that she got very drunk, was put to bed in a spare room, and woke up with Rangi having sex with her. She claims no memory of any interaction with Rangi until waking up. The defence case is that either the sex was consensual and she is lying about it, or, alternatively that she does not remember but she acted in such a way while drunk that Rangi had reasonable grounds to believe she was consenting. Are her convictions for driving while disqualified substantially helpful in assessing whether she would be lying about whether she consented to

having sex with a colleague while so intoxicated that she had vomited (and not woken up)? We think not. We also have some concerns about the extent (and tone) of the cross-examination on her previous convictions, given the focus of the trial and her role as a complainant:

Q: *So, Ms Sik, do you accept firstly that on [date], so that's about six or seven weeks before this incident, you were convicted in the [area] District Court for driving with excess blood alcohol where your level was more than one and a half times the limit and you were fined and you were disqualified from driving for six months from [date]?*

A: Yes.

Q: *And then do you also accept that on [date] you, presumably when pulled over by the police in your car, gave false details as to your identity and that you subsequently appeared in the [area] District Court on [date] and you were convicted and discharged in relation to that charge?*

A: Yes.

Q: *Thank you. Do you accept that you make **dumb decisions** when you're drunk?*

A: No.

Q: *Well, the decision to drive drunk, at more than one and a half times the limit on [date], was that a **dumb decision** or not?*

A: Yes, that was a stupid mistake.

Q: *And the decision that you made on [date] to give false information to the police, was that a **dumb decision** or not? ...*

Q: *Were you under the influence of alcohol when you did that?*

A: No.

Q: *You weren't? So, you were sober –*

A: *I think so.*

Q: *– when you lied to the police?*

A: *Because I knew I was disqualified and I knew the car was gonna get taken off me.*

Q: *Right, so you lied to cover your tracks, is that right? To keep your car, is that right, is that why you gave false information to the police and didn't tell them who you were?*

A: *At that time that's how I felt.*

Q: *Did you plead guilty to that charge or were you found guilty? That's the false, giving false information to the police, false, as to your identity, did you plead guilty or did you have a hearing and you were found guilty? The reason I'm asking that is that there was a long gap in time between when the offence occurred ... and you weren't dealt with by the Court until ... 15 months later.*

A: *I can't remember.*

- Q: Which suggests to me that you possibly defended the charge, did you or not?  
Can you remember having a hearing in the [area] District Court?
- A: I do remember having a hearing.
- Q: Where people gave evidence like this?
- A: No.
- Q: No, so you possibly pleaded guilty, you can't remember.
- A: I can't remember what happened.
- Q: All right.
- A: It's a long time ago.
- Q: Okay. So, you make **dumb decisions** when you're drunk and when you're sober, is that fair, is that what that conviction history says?
- A: No.
- Q: Ok.
- Q: Just when you gave false information to the police, you obviously weren't supposed to be driving and you knew that if they found out who you were, they would impound the car, is that right?
- A: Yes.
- Q: And you were sober, so is it fair to say that you did what you felt you had to do in dealing with the police to ensure you came through that unscathed, if I can put it that way?
- A: Sorry what does that mean?
- Q: Well you were prepared to lie to the police so that you didn't get your car taken off you. You chose to do that, didn't you?
- A: A stupid mistake.

In this part of the cross-examination, which we consider is overly lengthy regarding the actual relevance of Grace's previous convictions to an assessment of her veracity in a rape trial, defence counsel repeatedly put to her that she makes "dumb decisions", both when sober and when intoxicated. Grace attempted to recast those convictions as occurring in consequence of "stupid mistakes". We are of the view that the inference defence counsel was inviting the jury to draw from these questions (you make "dumb decisions"), was not that she was someone who generally lied (the alleged relevance of the conviction evidence), but, rather, she was someone who lacked the ability to behave appropriately. This line of questioning eventually led to a direct proposition that she was responsible for the events that occurred.<sup>78</sup> The admission and use of these convictions we believe should have been more limited, and should have been the discussion of a pre-trial decision.

78 See further Chapter Eight at [352](#).

## Section 25: expert and counter-intuitive evidence

### Forensic evidence: MEDSAC and ESR

In most of the combined cases, expert evidence concerning the forensic examination of the complainant and the results of any drug, alcohol or DNA testing was offered. In many cases, such evidence was offered in written form by consent or produced by a witness other than the expert. As the content of this material and its admissibility was outside the original scope of the research, we are unable to comment in any detail about the availability and use of the forensic evidence. When evidence from an expert forms part of the complainant's evidence, or forms the basis of a challenge to her evidence, we consider those examples as part of our discussion of relevance (earlier in this chapter),<sup>79</sup> or as part of the analysis of the questioning process (Chapter Eight).

As stated in Chapter One, however, we are of the view that there is a pressing need for a dedicated piece of research to be undertaken which will focus on the disclosure, use and admissibility of information gathered by the Medical Sexual Assault Clinicians Aotearoa (MEDSAC) experts who talk to and examine most adults who allege they have been sexually assaulted or violated. Our limited consideration of the admissibility and use of such evidence in the context of this research indicates that irrelevant evidence is admitted which may also negatively impact on the experience of the trial for the complainant.<sup>80</sup> Further, information that the complainant has given the MEDSAC examiner about her general and sexual health (including previous sexually transmitted infections), her preferred contraceptive method or when she last had sexual intercourse (and with whom), is often admitted (including as part of a section 9 agreed statement of facts) without consideration of section 44, or sections 7 and 8.

### Medical evidence about the effects of intoxication

In one case in the principal research, an expert offered an opinion about the effects of consumption of alcohol and at what point a person might become unconscious, fall asleep or be in an alcoholic blackout. In *Yamada*, as in a number of other cases, the complainant (Grace) had been drinking to the point of becoming very intoxicated and had been put to bed by a friend. Often in such cases the complainant has no recall of what happened once she is put to bed but gives evidence that she was woken by the defendant having sex with her. The defendant's evidence is that the complainant was behaving in a way that indicated

<sup>79</sup> See above at [208](#).

<sup>80</sup> See for example admission of evidence about medication at [208](#) above.

clear consent.<sup>81</sup> In *Yamada*, the defendant, Rangi, alleged that Grace allowed him to take off her top (that she could not remember having vomited on) because it was wet. Once in bed with her, Rangi said that she asked him to hug her, and when he cuddled into her back, she started rubbing her bottom against him, began fondling his penis, performed oral sex on him and then had sexual intercourse. Grace says she cannot remember any of that occurring and says that she would not have consented to have sex with Rangi (a workmate). Clearly at issue in the trial was whether Grace consented or whether Rangi had reasonable grounds to believe Grace was consenting.

An expert had prepared a brief of evidence, which was on the court file, and included the asking and answering of the following question:

*Is it reasonably possible, in the circumstances described, for the complainant to have acted in the way [the defendant] describes in his brief once they were in bed, and have no memory of it?*

*Yes. This inability to recall purposeful actions is characteristic of an alcohol blackout. It is reasonably common in people who are seriously intoxicated.*

Although we did not have access to the expert's evidence at trial, the defence closed by referring to Dr G's evidence that if Grace was in an alcoholic blackout it was quite possible that she just could not remember all the things that Rangi said she initiated with him. The judge in summing up said:

*Now we heard what is opinion, or expert evidence, from [Dr G] yesterday. There is no challenge to it and really it gave us background into issues such as the effect of the consumption of alcohol, the levels of intoxication, the issues of assessment of whether the complainant was asleep or unconscious or passed out, as it were, or having an alcoholic blackout.*

Our concern about the admissibility of such evidence is that, of itself, it raises a reasonable doubt. Expert evidence is not inadmissible just because it goes to an ultimate issue in the case (section 25(2)(a) of the Act). In our view, however, this type of evidence should ideally be accompanied by evidence that the complainant has never acted that way before when heavily intoxicated, or evidence from another expert who may be able to offer a view on how "common" purposive sexual conduct is during periods of alcoholic blackout. We consider this issue in more detail in Chapter Seven.

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81 This forms part of what is put to the complainant in cross-examination. We did not have access to the defendant's evidence.

### Counter-intuitive evidence

In 1999, the Law Commission discussed the significance of their recommended provision in the proposed Evidence Code concerning expert evidence about how a sexually abused child may behave:<sup>82</sup>

*The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women.*

Although that specific provision did not form part of the Act when it came into force in 2007, it is accepted that section 25 of the Act permits the admissibility of sufficiently helpful “counter-intuitive” evidence. In *DH (SC 9/2014) v R* the Supreme Court confirmed the approach taken by the Court of Appeal in *M (CA23/09) v R* with regard to the admissibility of such evidence.<sup>83</sup> In summary:<sup>84</sup>

- (a) Where the jury's verdict will depend on the assessment of the complainant's credibility there is a risk that unjustified assumptions may influence the jury's assessment. Expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse in order to allow the jury to consider the complainant's credibility from a neutral position.
- (b) The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is to ensure that the evidence is not used in a diagnostic or predictive way, as opposed to educative purposes. The witness should make it clear that he or she is not commenting on the facts of the particular case, that the expert evidence draws on generic research and is not commentary on the facts of the particular case, or the credibility of the particular complainant.
- (c) The evidence must be relevant to a live issue in the case (the Court acknowledging that all matters involving counter-intuitive reasoning will not necessarily be apparent when the expert's brief is prepared).
- (d) When counter-intuitive evidence is admitted the judge must instruct the jury of the purpose of the evidence and warn against improper use.

82 New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C111].

83 *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30].

84 Drawn from *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30].

Counter-intuitive evidence has mainly been concerned either with the behaviour of children who have allegedly been sexually assaulted or the behaviour of adult victims of family violence (as defendants in criminal proceedings).<sup>85</sup> There has been little debate or concern about the appropriateness of admission in those contexts. Evidence regarding the meaning to be made of adult complainant behaviour before and after the alleged offending, inconsistencies in accounts, or the likelihood of physical resistance, has not, however, been the subject of expert evidence in sexual cases in Aotearoa New Zealand to date.<sup>86</sup> One case in which counter-intuitive evidence was given about a complainant who was an adult at the time of the alleged offending is *HKR (CA792/2012) v R*.<sup>87</sup> In that case the evidence was focussed on informing the jury about “[t]he debunked myth[ology] ... that there is one way to react, that victims will always raise a hue and cry, and that they will cease contact with the offender.”<sup>88</sup>

Given the lack of appellate authority and the historical focus on educating the jury about the counter-intuitive behaviour of victims of intrafamilial sexual abuse, it is unsurprising that counter-intuitive evidence was admitted in none of the 40 cases.<sup>89</sup> In *Smythe* the prosecution made a pre-trial application to offer counter-intuitive evidence about delayed reporting. This was not a case in which there was a significant delay; however, there was evidence that a colleague of the complainant walked in on the alleged rape, and the complainant said nothing. The particular issue to address was therefore not a matter of delay, but what are the reasonable expectations concerning who a complainant should tell, and when. The judge held that the counter-intuitive evidence on delay the Crown sought to offer was not sufficiently relevant to the facts of the particular case – as it did not, in the judge’s view, shed light on why a victim may not tell a person who is present at the time of the alleged rape:

*In this case there was someone present at the actual time of the events during which one would have thought a complaint would be made. If there is no explanation for that in terms of counter-intuitive evidence, it is not in my view substantially helpful to hear why other complainants, who have not had someone present at the time to complain to, have subsequently delayed. My conclusion therefore is if the Crown is able to source research in the literature to support lack of complaint to a person present at the time of the event then that is substantially helpful but without that the evidence is not, as it currently is presented, substantially helpful to the jury in determining whether there was consent or not.*

85 *DH (SC 9/2014) v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2]; New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [1.25]; *H (CA376/2017) v R* [2018] NZCA 376.

86 At least as far as we are aware, relying on cases accessible through legal databases, which are primarily High Court or appellate decisions.

87 *HKR (CA792/2012) v R* [2013] NZCA 372, [2013] NZAR 1202.

88 At [14].

89 A separate focus of the research was the use of a delay direction under section 127 of the Act, a matter discussed in Chapter Nine at [405](#).

As previously discussed in the context of recent complaint evidence,<sup>90</sup> not only may complainants delay telling anyone, the first person they do tell might not be the person it might be expected they would tell. We are of the view, and this forms part of our recommendation for the repeal of section 127, that jurors should be advised not only that there may be good reason for a delay, but that a victim of sexual offending may not necessarily tell a particular person (such as a parent, best friend or work colleague). Regarding the lack of a complaint, or crying out, during the course of an alleged rape, there may be many reasons (including the wish not to escalate the harm or anger the perpetrator) that a complainant may choose not to take such a course of action. In *Smythe*, counter-intuitive evidence regarding complainant expected actions **during** the rape should have been viewed as helpful, and admissible, in our view.<sup>91</sup>

We also support the Law Commission's following recommendations, as they relate to cases involving sexual violence:<sup>92</sup>

[58] [W]e recommend that the Act should be amended to provide an express power to give a judicial direction to address any misconceptions jurors may have about sexual or family violence ...

[59] [W]e recommend that sample judicial directions should be developed to counter misconceptions that jurors may about sexual and family violence. As a starting point, directions should be developed to address the following assumptions:

- A complainant who dresses 'provocatively' or acts 'flirtatiously' is at least partially responsible for the offending.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- "Real rape" is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.
- It is not rape unless the offender uses force or the complainant suffers physical injuries ...

[60] We recommend that these directions should be contained in a publicly accessible jury trials bench book rather than in the Act itself.

90 Above at 218.

91 See further Chapter Nine at 469.

92 This recommendation has been accepted by the Government: *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* <https://www.beehive.govt.nz/sites/default/files/2019-09/Govt%20Response%20to%20Law%20Commission%20report%20-%20Second%20Review%20of%20the%20Evidence%20A....pdf>. We consider the desirable content of jury directions further in Chapter Nine.



### ***Conclusion: applying admissibility rules in sexual cases***

In this chapter, we have discussed the application of an admissibility rule that applies only in sexual cases (section 88), as well as those rules that are often applicable to the evidence that is offered in such cases. The absence of counter-intuitive evidence in any of the 40 cases in these studies (including the 10 Pilot cases) means we strongly support the introduction, and use, of judicial directions that have relevance in the context of adult rape trials. We also consider there is a need to capture, and extend, the contents of section 127 of the Evidence Act 2006 (the current delay direction) as part of the development of those directions.<sup>93</sup>

Aside from those matters, we do not see any major issues with regard to the drafting of the other rules of significance in sexual cases – but rather with their interpretation and application. In particular, we note with concern that section 88, regarding the evidence of the complainant’s occupation, is often ignored in practice, including in the Pilot cases. We are also of the view that the scope of section 88 could be extended, or clarified, to ensure it applies to evidence about the complainant’s status as a student, mother or beneficiary as well as to evidence about her education qualifications.

With regard to application of the requirement of relevance (that is, all evidence must be sufficiently relevant in order to be admitted), the cases in the principal research included, in our view, more irrelevant information about the complainant than those in the Pilot.<sup>94</sup> That this dynamic was apparent indicates another positive change from the implementation of the *Best Practice Guidelines*. There was also no evidence offered about the complainant’s convictions (such as driving offences) in any of the Pilot cases, while we were concerned to note this evidence was admitted in two of the cases in the principal research, with insufficient attention given to whether it was sufficiently relevant to either the complainant’s credibility or her veracity.

While there were few cases in which propensity evidence about the defendant was offered by the prosecution, in all cases except two, such evidence was admitted. In our view, the cases demonstrate some inconsistencies in the application of section 43. We also disagree with the decision in *Carter* in particular, which was a matter we believe should have been considered and appealed, if necessary, pre-trial, rather than raised at the start of the trial. With regard to the application of section 43, therefore, the cases expose some variations in approach to procedure and admissibility – however, given that the jurisprudence under section 43 is still developing, and the case numbers in this research are small, we do not make any reform recommendations.

93 See further Chapter Nine at 411.

94 But see also the discussion in Chapter Seven regarding the admission of matters going to consent and Chapter Eight regarding evidence relevant to the complainant’s credibility.

## CHAPTER SEVEN

## REPRESENTATIONS AND MEANING OF CONSENT IN QUESTIONING AND JURY DIRECTIONS

### *Overview of the law and the analytical approach*

The two research projects discussed in this book focussed on aspects of the trial process in adult rape cases. As previously stated, the principal issues at trial in these cases were consent and credibility, with identification and the fact of sexual connection not argued by the time of the trial.<sup>1</sup> In this chapter, the meaning of consent as represented and defined during the questioning of the complainant, and in the directions to the jury, is considered.<sup>2</sup>

The reference to the issue of consent is, however, an abbreviated way of referring to a number of inquiries that make up the offence of sexual violation by rape, even where penetration and identification are not at issue. First, the prosecution must prove beyond reasonable doubt that the complainant did not consent to the sexual connection (penetration of her genitalia by the defendant's penis).<sup>3</sup> While there is no statutory definition of consent in the Crimes Act 1961, section 128A provides a list of situations in which a complainant may "allow" a person to have sex with them, but such conduct does not amount to consent. The particular aspects of this section at issue in many of the research cases relate to unconsciousness, sleep and intoxication. This inquiry into the existence of consent is part of the conduct requirement (*actus reus*) of the offence.

Secondly, the prosecution must prove beyond reasonable doubt that the defendant had the requisite state of mind or fault requirement (*mens rea*) of the offence at the time the sexual connection occurred. Leaving aside the possibility that the connection was accidental (not argued in any of these cases), there are two alternative ways this element of the offence

1 See Chapter One at 4. However, in one case in the principal study, penetration for an unlawful sexual connection charge was at issue at trial.

2 Discussion as to the meaning of consent in closing submissions is discussed in Chapter Nine.

3 The following definitions from section 2 of the Crimes Act 1961 apply:  
**genitalia** include a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)  
**penis** includes a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex).

can be satisfied. The prosecution can prove (beyond reasonable doubt) that the defendant did not believe at the time of the connection that the complainant was consenting (a subjective test, based on what the actual defendant believed). Alternatively, the prosecution can prove (beyond reasonable doubt) that the defendant did not have reasonable grounds to believe the complainant was consenting at the time of the connection. This is an objective inquiry, based on what a reasonable person in the position of the defendant would have thought (so including, for example, consideration of the defendant's age in appropriate cases, but not his level of intoxication nor mental impairment).<sup>4</sup> An honest but *unreasonable* belief in consent, therefore, would not suffice to render the connection lawful.<sup>5</sup>

These elements of the offence of sexual violation by rape, which provide the background context to the existence of the complainant's consent and the belief of the defendant regarding her consent, provide fertile ground for cross-examination in particular. While reference to the defendant's belief is often characterised as his "defence", in legal terms the defendant's argument, in the form of propositions put to the complainant and other prosecution witnesses, is actually aimed at raising a reasonable doubt about one or more elements of the offence of rape. The defendant does not need to prove or disprove anything. The questions a complainant is asked about her consent are therefore either for the purpose of establishing that she did not consent and made that clear to the defendant (examination-in-chief), or for the purpose of suggesting that she either did consent or behaved in a way that the defendant would reasonably have thought she did (cross-examination). All the defendant has to do (tactically) in order to be acquitted, is to raise a reasonable doubt as to the complainant's lack of consent, or raise a reasonable doubt as to what a reasonable person would have thought about the existence of consent. The content of directions to the jury as to the legal elements are also considered as part of this chapter. Relevant to all the aspects of this discussion, and of particular importance with regard to many of the cases in this research, is the significance of complainant intoxication to either the existence of consent or the defendant's belief in consent.

The chapter begins with a consideration of consent – the legal meaning for the purposes of the offence of sexual violation (section 128 of the Crimes Act 1961) – and the ways in which the complainants in the cases expressed their lack of consent, either by words or actions. While the demarcation line in the questioning process is not always clear, the next part of the chapter will outline the types of questions and evidence that we consider were primarily aimed at establishing the defendant's state of mind at the time of the sexual connection. The intoxication of the complainant is seen as relevant to both of these inquiries. She may not have been able to give consent because she was too intoxicated (asleep or unconscious) or

4 *R v Clarke* [1992] 1 NZLR 147 (CA) at 149; *Nixon v R* [2016] NZCA 589 at [28]–[30].

5 This was the intended effect of the changes made in 1986: see Gerald Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 New Zealand Universities Law Review 97 at 102–105.

she may not remember giving consent because she was too intoxicated, but her behaviour, as asserted by the defendant, was consistent with giving consent (and so he has reasonable grounds to believe that she did). Evidence elicited through questioning of the complainant must, however, always be relevant and sufficiently probative – and so there is some overlap with the material covered in Chapters Five and Six.

In Aotearoa New Zealand, “question trails” are provided to the jury in criminal cases,<sup>6</sup> in conjunction with the oral summing-up by the trial judge. The provision of such question trails is viewed as part of best practice, as they are “a reliable and consistent means of providing juries with a logical path to follow in their deliberations”.<sup>7</sup> The path is a series of questions that sets out the elements of the offence the jury is to consider. According to the Court of Appeal, the question trails “help to keep the jury focused on the technical task at hand and to ensure that they do not get distracted into prejudicial, sympathetic or other impermissible reasoning processes”.<sup>8</sup> The question trail for use with regard to a charge of sexual violation by rape is now publicly available,<sup>9</sup> and it will be discussed, along with the question trails used in the cases in these two studies.

While the initial aim of the project was to consider the questioning process and the operation of the rules of evidence, not the substantive aspects of the offence of rape, the significance of intoxication to the questioning of complainants and the content of jury directions has meant this book includes some observations about the legal definition of consent. Further, while the focus of the research was on examining fair trial process, and the impact of questioning on complainant experience, not on rates of conviction, the number of acquittals in cases involving heavily intoxicated young women was striking and needed comment. The chapter therefore includes discussion of the need for changes to the substantive law, which will invariably have consequential effects on complainant questioning.

### ***The definition of consent***

The relevant part of section 128 of the Crimes Act 1961 provides:

- (1) Sexual violation is the act of a person who–
  - (a) rapes another person; or
  - (b) has unlawful sexual connection with another person.

6 Question trails, or similar structured decision aids for the jury, are used in some other jurisdictions, such as England and Wales, where they are collectively referred to as “routes to verdict”. Research on the efficacy of question trails is currently being written up: <https://www.lawsociety.org.nz/practice-resources/practice-areas/courts/new-zealand-juries-get-better-judicial-guidance,-study-shows>

7 <https://www.courtsofnz.govt.nz/for-lawyers/question-trails/>

8 *Rawle v R* [2019] NZCA 249 at [18].

9 <https://www.courtsofnz.govt.nz/for-lawyers/question-trails/sexual-violation-by-rape-section-128-crimes-act-1961>

- (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,–
- (a) without person B's consent to the connection; and
  - (b) without believing on reasonable grounds that person B consents to the connection.

While the offence of rape is defined in gender-neutral terms, with the focus on the body parts of “person A” and “person B” not their sex or gender identity, all the defendants in the research cases were male (person A) and all the complainants were female (person B).<sup>10</sup> Once (intentional) penetration is accepted or proved, then the next element of the *actus reus* of the offence to be established is the absence of consent to the penetration of person B, that is, “without person B's consent”.

As already noted, there is no statutory definition of consent in the Crimes Act 1961, and at the time of the most recent amendment to section 128, the Select Committee did not recommend enacting a definition, despite many submissions in support. The Committee was of the view that the common law had developed adequately.<sup>11</sup> The current common law definition, aspects of which are used in the context of jury directions, is:<sup>12</sup>

*Consent means true consent if it is freely given by a person who is in a position to give it. It is important to distinguish between consent that is freely given, and submission to what the complainant may regard is unwanted, but unavoidable. For example, submission by the complainant because she is frightened of what might happen if she does not give in is not true consent. Equally, submission because she feels powerless, or trapped, or exhausted is not true consent. The fact that a person does not protest or physically resist, or ceases to do so, is not of itself to be taken as consent. Consent may be conveyed by words, by conduct, or by a combination of both. The material time of consent and belief of consent is to be considered as at the time the act actually took place.*

The point at which consent must be considered was emphasised in *R v Adams*, where the Court of Appeal referred to the Criminal Jury Trials Bench Book standard direction that stated at that time (in 2005):<sup>13</sup>

<sup>10</sup> See further Chapter One at 13.

<sup>11</sup> Law and Order Select Committee Report *Crimes Amendment Bill (No 2) 2005*, at 9.

<sup>12</sup> This is described as a “model direction” in *Garrow and Turkington's Criminal Law in New Zealand* (LexisNexis online) at [CRI 128.4]. The definition used in the publicly available question trails is: “‘Consent’ means true consent freely given by a person who is in a position to make a rational decision. There is no presumption of law that a person is incapable of consenting to sexual connection because of age. Lack of protest or physical resistance does not, of itself, amount to consent.”  
<https://www.courtsofnz.govt.nz/for-lawyers/question-trails/sexual-violation-by-rape-section-128-crimes-act-1961>

<sup>13</sup> *R v Adams* CA 70/05, 5 September 2005 at [48] (emphasis added). See also *Henry v R* [2019] NZCA 266 at [26] and *Hazelwood v R* [2019] NZCA 484 at [27].

*The material time when consent, and belief in consent, is to be considered is at the time the act actually took place. The complainant's behaviour and attitude before or after the act itself may be relevant to that issue, but it is not decisive. The real point is whether there was true consent, or a reasonably based belief in consent, at the time the act took place.*

The Court noted that while evidence of events that occurred before and after the acts of sexual intercourse might be relevant in determining consent, they are not decisive.<sup>14</sup> This statement is also reflected in the current standard jury directions.

A court may also give a direction that consent may be reluctant, regretted or irrational. It is not necessary to do so in every case. Instead, whether such a direction is required will depend on the factual narrative and the approach taken to the defence at trial.<sup>15</sup> However, as discussed later, we question the use of the concept of “reluctant consent”, given that the dictionary definition of “reluctant” means unwilling; disinclined; or struggling in opposition.<sup>16</sup>

In *Christian v R* the Supreme Court noted that the questions of consent and reasonable belief in consent are often nuanced and fact-specific.<sup>17</sup> Consent cannot be inferred only from the fact that there is no protest from the complainant, or that they do not offer physical resistance. “Something more” is required to infer consent, either in the words used or conduct or circumstances, or a combination of these things. One example could be a positive expression of consent, although there are others, including, somewhat contentiously, relationship “expectations”.<sup>18</sup>

The Supreme Court did not agree with the Court of Appeal’s reliance on the statements from *Ah Chong v R* to conclude that consent must be expressed “in a positive way”.<sup>19</sup> In one case in the principal research, however, prior to the decision in *Christian*, the judge did define consent as a “positive and affirmative action”.<sup>20</sup>

14 *R v Adams* CA 70/05, 5 September 2005 at [49]; *Henry v R* [2019] NZCA 266 at [26].

15 *Charlton v R* [2016] NZCA 212 at [50]. See also *R v Herbert* CA 81/98 12 August 1998 at 3, cited with approval in *R v Adams* CA 70/05, 5 September 2005 at [43].

16 <https://www.dictionary.com/browse/reluctant>

17 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [43].

18 At [45]–[46]. What the “others” might be is unclear, as the Supreme Court focussed only on relationship “expectations”, and the Court’s discussion of such expectations has received criticism: see Andrea Ewing “Consent and ‘Relationship Expectations’” [2017] Te Wharenga New Zealand Criminal Law Review 357 and see further below at 282. We agree with Ewing that consent should not be inferred from either relationship expectations or the fact that the complainant was intoxicated – neither should amount to “something more” that indicates consent has been given by an otherwise non-resisting complainant.

19 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [43] ff.

20 *Harete*, summing-up.

*Consent means a true consent given by a person who is in a position to make a conscious decision and choice and that consent must exist at the time sexual connection begins. Obviously, an unconscious woman cannot consent. **Consent is a positive and affirmative action.** It is not something that a male is entitled to take for granted and take his chances hoping that consent will be forthcoming at some later point. Consent must be present at the moment the sexual connection begins.*

Section 128A specifies various matters that do not constitute consent to “sexual activity” (defined in section 128A(9)), without limiting the circumstances in which there is no consent (section 128A(8)):

**128A Allowing sexual activity does not amount to consent in some circumstances**

- (1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.
- (2) A person does not consent to sexual activity if he or she allows the activity because of—
  - (a) force applied to him or her or some other person; or
  - (b) the threat (express or implied) of the application of force to him or her or some other person; or
  - (c) the fear of the application of force to him or her or some other person.
- (3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
- (4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.
- (5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.
- (6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.
- (7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.
- (8) This section does not limit the circumstances in which a person does not consent to sexual activity.

- (9) For the purposes of this section,–
- allows** includes acquiesces in, submits to, participates in, and undertakes **sexual activity**, in relation to a person, means–
  - (a) sexual connection with the person; or
  - (b) the doing on the person of an indecent act that, without the person’s consent, would be an indecent assault of the person.

Section 128A(3) and (4), most at issue in the cases in these two studies, were introduced in 2005 but are viewed as a codification of the common law. According to the Supreme Court, section 128A(2)–(7) set out “statements of law that define consent by excluding particular actions or omissions from the scope of the concept”.<sup>21</sup>

### ***Evidence and questioning treated as relevant to consent in the principal research and Pilot cases***

The Crown must prove that the complainant was not consenting to the sexual connection at the time it occurred. In adult rape cases, evidence about the existence, or not, of consent, will usually be given by the complainant and the defendant (either at trial or in pre-recorded video format), as often the alleged offending is not witnessed – although complainant and defendant conduct before and after may well be. Jurors are invited, by both the prosecution and the defendant, to draw inferences as to consent from complainant behaviour in particular. However, while some behaviours may be indicative of the presence or absence of consent, words spoken are also of significance. The ways that complainants in the research verbally and physically expressed lack of consent are considered in the first part of this discussion.

### ***Significant numbers of cases in which lack of consent was verbally and physically expressed***

In 23 of the 30 cases in the principal research, the complainant gave evidence that she had told the defendant she did not consent to what he was doing.<sup>22</sup> What the complainant reported saying were variations of “no”, “don’t” or “leave me alone”, sometimes said multiple times.<sup>23</sup> In one further case, taking the number of “expressed lack of consent” cases to 24 out of 30, the complainant gave evidence that she “didn’t say yes” (*Walters*). Three specific examples from these cases where the complainant clearly indicated “no” follow:

21 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [44].

22 This includes a case in the principal research in which the defendant was also charged with kidnapping and the main focus of the cross-examination on that charge (propensity evidence of the defendant’s previous convictions for rape was admitted: *Jacobs*). As the complainant’s evidence in chief was by way of evidential video interview (EVI), there is no information about whether/how she voiced non-consent during her evidence, but in closing the Crown refers to the complainant’s evidence that she had tried to push the defendant off her.

23 This number included three cases in which the complainant gave evidence of saying “no” after being woken up to find the defendant raping her.



Q: So when he told you that he was going to take your clothes off anyway, what did you do?

A: I just told him that I, I don't wanna do this. (*Ahmed*)

...

Q: Okay. Then what's the next thing that happens?

A: Um, well he kind of holds me and he's – I said, "No, this can't happen." I told him – I was really confused, shocked, because this was someone I trusted and I – this can't happen, I still liked [my ex-boyfriend] and he knew that, he knew I was upset about it all and he just, you know, he said, you know we didn't like each other previously and I asked him, you know, "Why are you doing this?" and he said, "You know, oh hatred builds sexual tension and this is the best way to get revenge. And [your ex-boyfriend's], you know, a hundred times better looking than me and this is my only chance," kind of thing. And at that stage he was a friend that I trusted so it's not easy compared to, you know, someone you don't know when, you know, everything just shatters I guess ...

Q: And physically what was happening between you while that was going on?

A: I was shocked at that stage and the next part nearly – he, um, tried to go down, um, moving his head downwards on my body and he said, "Don't you want me to go down on you?" and I said, "No". (*Buchner*)

...

A: I was telling him to stop and was pushing his hand away. I told him to just take me home, so right from the start I said no, you know, "You can't be doing this, you need to take me home please, just take me home", so he ended up pushing his hand right up past my undies and ... he ended up basically putting his fingers inside me. (*Young*)

In two of the Pilot cases, the complainant gave evidence that she told the defendant to stop, once she was aware of what was happening. The following is an extract from *Waititi*:

Q: So, you were trying to say you didn't want it. Do you know if you said, what words you said?

A: I would have said, I'm not sure what the exact words were but it was certainly something, "I don't want this," or, "Stop doing what you're doing," or, "Get off ..."

Q: You said you were telling him to get off. What was the tone of your voice?

A: It wasn't very loud. I remember thinking that my flatmate would have been in bed and his bedroom is just down the hallway and I was hoping that perhaps he would have heard me, but I wasn't screaming.

- Q: *How many times do you think you might have told him to get off you?*  
A: *I wouldn't be able to say that for sure, but several times. Definitely more than once.*

In *Edwards*, from the principal research, the intoxicated complainant woke up to find the defendant in bed with her and described what she alleged happened next:

- A: *I just kept telling him I didn't want this, and I kept crying.*  
Q: *What was his response to you telling him you didn't want this?*  
A: *He just kept repeating to me, telling me to be quiet, and I had to listen to everything he said.*  
Q: *Did he tell you why you needed to be quiet?*  
A: *No.*  
Q: *Did you remain quiet or not?*  
A: *Kind of, I was just crying too much and telling him to stop, 'cos I didn't want it.*  
Q: *What did you think would happen if you called out?*  
A: *That he would harm me ...*  
Q: *You told us that during this you were telling him to stop, or that you didn't want him to be doing what he was doing to you, how many times did you say that?*  
A: *I just kept repeating it most – the whole time.*  
Q: *So, you just kept repeating it and –*  
A: *Yes.*

In *Schuetz*, the complainant also woke up, realised someone was on top of her and told him to leave her alone:

- Q: *And when you woke up and you found yourself there what was happening?*  
A: *Um, I was lying face down and I could feel somebody on my back, the pressure of another body and I could feel somebody's fingers inside my vagina.*  
Q: *Did you know who it was at that point?*  
A: *At that point, no.*  
Q: *Did you say or do anything?*  
A: *I said, "No," that I didn't want this ...*  
Q: *What happens next, just tell us in your own words?*  
A: *I saw that it was him and I think I blacked out for a little bit. When I woke up again, he had his penis in my vagina and was having sex with me. I asked him to stop and said that I didn't want it. I tried to move my arms, but they were weighed down like he was holding on to them. So, I continued to ask him, telling him that I didn't want this and to hurry up and get out. I blacked out again for a bit.*

- Q: *How did it end?*  
 A: *It ended with him finishing and then he, –*  
 Q: *What did he do –*  
 A: *– got up and left.*

In terms of the traditional expectations of complainant resistance and communicating lack of consent clearly (by saying a version of “no”), this occurred in a minimum of 26/40 cases (65%), combining both groups.<sup>24</sup>

In 12 of these 26 cases, the complainant also gave evidence that she tried to physically resist the defendant, by pushing him, moving or twisting away. The following are examples from three of these cases:

- Q: *And what happened after that?*  
 A: *Um, I reminded him again that, you know, we were, you know, not having sex, and he said, “Okay,” and started kissing me, and I pulled my head back, like, while he was kissing me, um, to say something. I can’t remember what I was going to say but he held his hand on the back of my head and I kind of used my forehead – to sort of pry my lips away from his mouth.*  
 Q: *Was he saying anything at that point?*  
 A: *Um, he wasn’t, but I was.*  
 Q: *What were you saying?*  
 A: *I was saying, “No.”*  
 Q: *What did you do?*  
 A: *Um, I put my other hand out and kind of formed a triangle so that he couldn’t push me over further.*  
 ...  
 Q: *Was he pulling you towards him?*  
 A: *Towards him sorry, towards him and I was trying to roll away from him and he had my arms so he was trying to roll my arms over and I was trying to roll away and so it was hurting my arms and I told him I was like “Can you stop it, you’re hurting me” and I said “You’re with [girlfriend]” and yeah I mentioned that a lot and I said “Stop it, go away” and then I froze and I didn’t quite know what to do because I haven’t been in that situation before ...*

---

24 In the absence of information from the EVIs of six of the complainants, it is not certain what evidence the complainant gave about communicating lack of consent. However, in five of these cases the prosecutor said in closing that the complainant’s evidence was that she had woken up to the defendant (in all cases, not a current or previous boyfriend) having sex with her. In the other case (*Simon*), the prosecutor made the argument that the complainant was too intoxicated at the time to be capable of consenting.

- Q: *Did you say anything to him?*
- A: *I just said, tried to stop him by putting my hands behind me and pushing him back and saying, “no, not that.”*
- Q: *Where do you think you were pushing on him?*
- A: *On his upper leg.*
- Q: *And what did he do when you did that?*
- A: *He just carried on.*
- Q: *Okay, and did you say anything else to him?*
- A: *I just continually tried to push him away and stop him and just say, “Look, no, no.” I was you know worried about infections, and it was hurting and I just tried to get him to stop.*

In a number of the cases, the complainant also gave evidence of being scared or too shocked to move or resist, or to immediately articulate lack of consent:

- Q: *So, are you saying that you lay there like a brick, didn’t move, had your eyes squeezed shut and just wanted it to be over?*
- A: *I did my best to say no as many times as I could. I was frightened, and he was heavy and he was pushing my face and he was spitting on me, and holding me.*

...

- A: *He let me lie down on his bed. He sat on top of me. Then he started to kiss [me] ... But I was scared and I also wanted to cry. So, I said to him, “No, no.” He didn’t listen to me. So, he put his [penis] in my [vagina]. I had to allow it to happen because he was on top of me and I was so scared that he would hurt me or kill me. So, I thought I’d just let him do what he wanted to then I could go home once it’s finished.*

...

- Q: *And in the car at that time, did you say anything at all to him about that? Did you respond to that?*
- A: *I just said, “No. This is not what I want.” But I was also in a lot of shock, and I was crying uncontrollably, and all I remember is just saying, “No. This cannot be happening. No, this is not what I want.”*
- Q: *When he began having sex, how did you respond to that?*
- A: *I closed my eyes and pretended it wasn’t happening, because I didn’t – there was nothing I could do.*

**Q:** *Did he say anything to you while the sex was going on?*

**A:** *He was just moaning a lot, and I could just hear him panting in my ear, and I just had my head to the side, with my eyes closed, saying: “No. This can’t be happening”.*

In the 14 cases in which the complainant did not give evidence of verbalising lack of consent and/or physical resistance, the complainant’s version of events was:

- ▶ that she woke up to the defendant raping her (seven cases); or
- ▶ that she had limited or no memories of the event due to intoxication (two cases); or
- ▶ that she only became aware that someone had had sex with her when waking later (five cases).

This research, therefore, demonstrates that in **all cases** in which the complainant was able to resist or verbally express lack of consent when the unwanted sex began, she did so. But even when these women did give evidence of behaving in a way that was consistent with the expectations of a real rape victim (saying “no” and/or physically resisting), such behaviour was read as consent (or providing reasonable grounds to believe there was consent). In 13 (50%) of these cases, the defendant was acquitted of rape.

### ***Capacity to consent when intoxicated, asleep or unconscious***

#### **The complainant’s evidence about her situation at the time of the alleged rape**

As previously discussed, there were 14 cases (seven from the principal research and seven from the Pilot), in which the complainants gave evidence that they were intoxicated at the time of the alleged offending, which impacted on their ability to resist or to verbalise lack of consent. In some cases, the complainants did not know about the offending until waking later or the next day.

For example, the complainant in a case in the principal research woke up feeling sick the next morning and discovered a cut inside her vagina:

**Q:** *Tell us in detail what it was that you noticed or felt when you woke up?*

**A:** *I was very, very sick, very drowsy, vomiting and vomiting next to my bed and dizzy as can be and, oh, and then I went to the toilet and I was bleeding and bleeding and, um, I didn’t quite know what had happened to me I had no recollection of anything of events the night before, I just wondered why I woke up.*

In three of the Pilot cases, the complainants gave evidence that they were unaware of being penetrated at the time it occurred and only realised later by being told by others or noticing physical traces.

In seven cases in the principal research, and seven in the Pilot, the complainant gave evidence she had become intoxicated and either went to bed or was put to bed by friends, waking up, or drifting in and out of consciousness, and becoming aware at some point that the defendant was in bed with her. In one Pilot case the complainant gave evidence that she was in and out of consciousness during the alleged rape and gave evidence during cross-examination that she was “intoxicated and up until [the defendant] arrived had been asleep and ... I didn’t verbally consent to anything that he did to me. He didn’t ask at all”. In two other cases in the Pilot the complainant had gone to sleep, after a night out, and woke up to the defendant raping her.

In two cases in the principal research, both complainants gave evidence of being extremely intoxicated in a public place and having limited memory of the events, although becoming aware that a man had had sex with them. In *Harete*, the complainant said she was walking home, heavily intoxicated, when someone she did not know pulled up beside her:

Q: *When this person said, “Suck my dick” were you in the car or out of the car?*

A: *I don’t know. I can’t remember.*

Q: *Do you remember ever actually being inside the car?*

A: *No. I think –*

Q: *You’ve said that you remember pulling your pants up?*

A: *I remember the – a light, a street light –*

Q: *Yeah.*

A: *– a bonnet and pulling my pants up and – [that’s all]*

When adding to these 14 cases the five cases in which the complainant gave evidence that she awoke to the defendant raping her and resisted and/or said “no” at that point – this means that in 19 out of 40 cases the complainant’s evidence was that she was either very intoxicated and/or asleep when the defendant penetrated her. In 14 of these 19 cases (74%) the defendant was acquitted of rape.<sup>25</sup>

In bed/lying down after drinking	Woken by defendant’s conduct	Became aware of rape when waking later	Intoxicated in public place	Total cases	Verdict = guilty
Principal research (n=9)	7	2	2	11	3 (27%)
Pilot cases (n=9)	7	2	1	10	3 (30%)

25 In one case, the conviction was successfully appealed. The re-trial was pending at the time of writing.

### Complainant intoxication as relevant to consent: drunk enough to be incapable of consenting?

As previously set out, section 128A of the Crimes Act 1961 provides:

- (3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
- (4) A person does not consent to sexual activity if the activity occurs while he or she is **so affected** by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

While subsection (3) does not require an inquiry into the complainant's capacity to consent when she is asleep or unconscious (consent is simply not possible in those two scenarios), subsection (4) does require information about whether the complainant is "so affected" by alcohol that she cannot consent. Capacity to consent therefore becomes a live issue when the complainant has been drinking or taking drugs.

When complainant intoxication is at issue at the trial as being relevant to consent, one line of questioning will, therefore, focus on **how** intoxicated the complainant was at the relevant time. In *R v Kim*, the Court of Appeal held that whether a complainant was so affected by alcohol or drugs that he or she could not consent or refuse to consent to the activity must be decided by the jury in light of the available evidence:<sup>26</sup>

*There is no requirement in law that there be some independent verification of the complainant's level of intoxication, or that there be expert evidence on the effect of such a level of intoxication on the ability to consent.*

The consequence of this approach, an assumption that the jury is able to make an assessment of complainant intoxication, and therefore capacity, is that expert evidence is rarely used. Instead jurors are asked to apply their common sense, or layperson's knowledge, about the effects of alcohol and other drugs in order to make decisions about what are "complex cognitive functions". We agree with Luke McNamara that the ability of jurors to do this task effectively is questionable.<sup>27</sup>

<sup>26</sup> [2010] NZCA 106 at [20].

<sup>27</sup> Luke McNamara and others "Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects" (2017) 43 Monash University Law Review 148 at 168.

Further, the authors of *Adams on Criminal Law* state that “whether consent is ‘genuine’, in any particular situation, requires an assessment of the circumstances, taking into account *relevant community values and expectations*”.<sup>28</sup> There is clearly a need to explore what, indeed, are the relevant “community values” that a jury should refer to when making decisions about whether an intoxicated complainant was in a position to give free and voluntary consent. The risk is that reference to “community values” is an invitation to make negative judgements about the complainant’s behaviour and assign her responsibility for the (unwanted) outcome of her drinking. Research into juror attitudes about complainant intoxication indicates that complainants are viewed as being able and willing to consent after drinking, and should be aware of, and avoid, the “risks” of becoming intoxicated if they do not want to have sex.<sup>29</sup>

Consistent with overseas research, one of the ways evidence of intoxication is offered is by use of a numerical rating scale (NRS). The prosecutors inquired as to the number and strength of the drinks (or type of drug) the complainants had, and over what period of time – and they were often asked to describe their level of intoxication on a scale of 1 to 10:

Q: *You’ve told us about what you’ve had to drink that night. On a scale of, let’s say 1 being sober like you are now, hopefully, and 10 being very intoxicated, where would you have put yourself on that scale on the time that you went with the accused while he was going to get something?*

A: *Nine. (Patel)*

...

Q: *On a scale of 1 to 10, 10 being really intoxicated and 1 being completely sober, where would you put yourself on that spectrum by the time you went to [address]?*

A: *I was probably about an 8 because I’m not actually a big drinker so I, yeah.*

Q: *Were you able to walk on your own or did you need assistance?*

A: *I could walk on my own but I was a little bit stumbly ...*

Q: *Can you remember why on this particular morning, you agreed to go and have some marijuana?*

A: *I think I do definitely blame my intoxication of, yeah that reason ...*

28 Simon France (ed) *Adams on Criminal Law – Offences and Defences* (online edition): at [CA128A.07].

29 Emily Finch and Vanessa E Munro “Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study” (2005) 45 *British Journal of Criminology* 25; Emily Finch and Vanessa E Munro “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials involving Intoxicants” (2007) 16 *Social & Legal Studies* 591.



Q: Are you still sitting at about an 8 prior to having the marijuana or have you consumed anything else?

A: I'm probably to my limit, definitely. Probably a **good nine and a half**. I definitely, I wasn't feeling good before we went and smoked marijuana, so yeah, I knew I wasn't okay at that point. I just didn't really know what to do, yep ...

Q: And where are we on that spectrum now of one to ten in terms of your –

A: Totally don't know where I am, just yep. I have never been that bad, I have never been that bad, so it was just all way too much for me. (*Jackson*)

...

JUDGE: Ms Saunders, perhaps you can help us this way, when you were getting ready to go to bed ...

A: Yep.

JUDGE: You were in the bedroom ...

A: Yep.

JUDGE: Let's use a scale, one is stone-cold sober and 10 is falling over drunk, where do you think you would be in that scale of 1 to 10?

A: Um, I dunno, probably around an **eight**, it took me a while to get my jamas on and I needed – yeah, we couldn't leave the – had to have the bedroom door open 'cos the room was spinning around.

JUDGE: Ok, alright, thank you. (*Kata*)

...

Q: So I'll take you to that point to about midnight and I want to ask you about your level of intoxication, okay?

A: Yup.

Q: So, if we have a scale where 1 is no alcohol at all and 10 is **very drunk or unconscious**, as at midnight where do you think you would've sat on that scale?

A: **Seven**. (*Smythe*)

As Julia Quilter and Luke McNamara point out, however, using this type of scale is not fit for purpose in the context of trying to establish whether a complainant had the capacity to consent at a particular point in time:<sup>30</sup>

30 Julia Quilter and Luke McNamara "The Meaning of 'Intoxication' in Australian Criminal Cases: Origins and Operation" (2018) 21 New Criminal Law Review 170 at 181.

*Although NRSs are widely regarded as valid as a self-report mechanism for assessing pain, their use for the self-assessment of intoxication levels is more contentious, particularly for criminal law purposes. Although there is evidence of NRSs having some utility in assessing generic degrees of intoxication, such scales are insensitive to the wide spectrum of alcohol and other drug effects covered by the term “intoxicated.” ... It follows that NRSs are likely to be an unhelpful guide to the nuanced, discrete intoxication-related issues on which a criminal court may be required to adjudicate – such as whether a witness’s testimony is reliable, whether a complainant in a sexual assault case consented, or whether the accused acted with the requisite mens rea.*

The use of this description of the scale – with 10 as “unconscious” – may also suggest to the jury that a level very close to the upper end of the scale is required in order for a complainant to be unable to consent, and that this level of intoxication is the standard referred to in section 128A(4). That is, the person who is “so affected” that she “cannot consent” is an unconscious person. However, it cannot be the case that a state of unconsciousness is required in order for intoxication to have had an influence on a person’s ability to consent, given that consent must be “full, voluntary, free and informed”.

Asking a complainant to “self-assess” her intoxication by reference to a scale of 1 to 10 may also not be the best measure of how affected she actually was at the time of the rape given that nothing is usually known about what comparison *she* is making – to other times she was intoxicated or to her observation of the behaviour of others? In *Edwards*, the complainant (18 years old at the time), may well have understated her position on the “scale”, given the amount she had consumed and the consequential conduct of her friends:

- Q: *And over the course of the evening, how much do you have to drink?*  
 A: *Probably 15 [cans] or more.*  
 Q: *Of what?*  
 A: *Um, mainly Billys [reported as being 500 ml cans of 9.9% premixed spirits].*  
 Q: *Okay. So, on a scale of 1 to 10, 1 being sober and 10 being intoxicated, at the end of the evening, where would you put yourself?*  
 A: *Seven maybe ...*  
 Q: *Do you know why you were taken to bed?*  
 A: *'Cos I was a bit too drunk and I was getting real angry.*  
 Q: *Okay. When you said you were a bit too drunk, could you just describe that to us a bit more, were you steady on your feet or not?*  
 A: *Not really.*  
 Q: *Okay. So anyway, your three friends take you to, or put you down for a sleep, is that right?*  
 A: *Yes.*

Some complainants, perhaps so as not to make a poor impression, also resisted being described as “drunk”, such as in one case in the principal research, where the complainant had drunk five 250 ml 8% cans of premixed spirits in an hour and a half. In re-examination she said she was “[f]eeling good – I’m gonna say with a few drinks, that’s feeling good for me.”

In cases in which the complainant’s evidence was that she did not consent, either because she was so intoxicated that she was unable to, or was asleep as a consequence of drinking, one focus of the cross-examination was that she was not really *that* drunk. The cross-examination focussed on the fact that she was still able to consent, either because of the amount she drank that night or because she was a regular drinker:

Q: *You are an experienced drinker?*

A: *Yes.*

Q: *It’s not unusual for you to go out of a night on Friday night –*

A: *No.*

Q: *– and have quite a few drinks?*

A: *Yeah.*

Q: *That’s fair?*

A: *Yes.*

Q: *So that night that we’re talking about, it wasn’t an exceptional night for you in terms of drinking?*

A: *No.*

Q: *You do that quite a bit?*

A: *Yes.*

Q: *So, you’re not a stranger to alcohol?*

A: *No.*

Q: *You’re not a stranger to the effects it can have on you?*

A: *No.*

Q: *Although you had been drinking, you wouldn’t have described yourself as being hopelessly drunk, would you?*

A: *No.*

Q: *No. Because you still knew what was going on, didn’t you?*

A: *Not completely.*

Q: *Well, you were able to talk to people, correct?*

A: *I think so.*

Q: *Yes. You were able to text on your telephone?*

A: *Yep.*

Q: *And if you were drunk and out of control, you wouldn't be able to do that, would you?*

A: No. (*Patel*)

...

Q: *And do you accept that you started drinking alcohol soon after you got home?*

A: Yes.

Q: *Because having a few drinks on a Friday night was not an uncommon thing in your house, was it?*

A: No. (*Waititi*)

Questions about level of capacity also focussed on the complainant's ability to carry out particular actions (use a cell phone, have a sufficiently lucid conversation, catch a taxi):

Q: *Good morning Ms Cowan. Perhaps I'll start with your level of intoxication on the night. Now you said that you had about four cans when you were at [friend's] house?*

A: Yeah.

Q: *And another three cans of those premixed drinks when you were at the [pub], is that right?*

A: Ah, it wasn't cans. It was – got cups.

Q: *Cups right.*

A: Yep.

Q: *So, would it be fair to say that you were drunk but not so drunk as falling over and not being able to walk about?*

A: Ah, I was intoxicated, yes –

Q: Yes.

A: – but I knew what was happening.

Q: *Yes. And you knew what you were doing and what you wanted and what you didn't want?*

A: Yes.

Q: *Right. So, you could walk about?*

A: Yes. (*Depak*)

...

Q: *Do you think you drank more than you usually do?*

A: Yes ...

- Q: And would you accept that you didn't show any signs to bar staff that you were so drunk?
- A: When I've been drinking, I can walk very straight.
- Q: And you can hold your liquor reasonably well?
- A: Depends on how fast and – how fast I consume it, yes ...
- Q: And I suppose, I'm not trying to be mean here but you can hold your drink more than say a, you know, a tiny little girl could?
- A: Yeah. Yes ...
- Q: So the taxi is called, you go in the front. You're in a good enough state then – alcohol-wise you're not too drunk then.
- A: I remember talking to the taxi driver.
- Q: It wasn't like you're going to be a soil risk for the driver, was it, at that stage?
- A: Risk?
- Q: A soil risk, you weren't going to soil his cab, you weren't going to vomit in his taxi?
- A: Oh, no, no. (*Tait*)
- ...
- Q: Well let me put it – what I'm really asking is this, at some stage you've offered to Tara the bedroom and she goes to the bedroom doesn't she?
- A: Yeah.
- Q: So, did you think that she must have understood your offer, "You can stay in the bedroom"?
- A: Yep.
- Q: And clearly you were, if I can put it this way, not so drunk that you were incapable of making that offer to her at that point in time, right?
- A: Yeah, I guess, yeah. (*Kato*)

Such evidence invites the inference that the complainant was not so intoxicated she was unable to consent to sex with the defendant:<sup>31</sup>

*The evidence shows, says [defence counsel], that despite her apparent intoxication Ms McKay [the complainant] remained functional. She made a decision to walk home, she was walking home, she had chosen a route, she was able to talk. [Defence counsel] says this indicates that she was well able to make a conscious and free choice about whether she had sex or not. [Defence counsel] suggests to*

31 Summing-up in *Harete*.

*you that her claim not to remember the sex act or the consent issues that go with it does not show that she was drunk beyond a point where she could give valid consent. It simply shows that she had alcohol-induced amnesia after the event but that does not mean that she was not conscious and acting voluntarily at the time intercourse took place and when the accused maintains that her consent was obtained. [Defence counsel] reminds you that this young lady was able to give valid consent to a medical examination later in the day.*

However, we consider that consciousness *of itself* should not be presumptive as to sufficient capacity in this context. To use the words of Clare McGlynn:<sup>32</sup>

*If it is the case that juries consider complainants to retain capacity simply by reason of their being able to move about and take even such simple decisions as crossing roads or taking a bus, despite evidence of memory loss, instability in movement [and] vomiting ... then in practice lack of capacity is coterminous with unconsciousness ... This means that a heavily intoxicated woman is indeed extremely vulnerable to rape as she will be assumed to have capacity to consent.*

Section 72A(4) does not require lack of consciousness (which is covered by section 72A(3)), rather it provides that a person does not consent to sexual activity if the activity occurs while she is “so affected by alcohol ... that she cannot consent or refuse to consent”. This requires reference back to what is meant by consent: “freely given by a person by a person who is in a position to make a rational and informed decision”. A very intoxicated young woman, who has been put to bed by her friends as a consequence, does not seem to us to be in such a position.

In 14 of the cases in our research, however, the complainant’s evidence went further than that she was drunk – rather, that she was so intoxicated that she was having blackouts and, in some cases, had (unknowingly) vomited. In one of the five cases in which the defendant was convicted of the rape of a severely intoxicated young woman, the sentencing judge said:<sup>33</sup>

[11] ... [The complainant] was coming in and out of consciousness and had no motor skills. All of that was, on my view of the evidence, obvious to you.

[12] There was no positive act by [the complainant] by word or conduct to suggest that she consented to anything you did. The fact of the matter is she was **entirely incapable** of consenting to your actions. The law reflects the facts in this case. She was quite obviously unconscious or semi-unconscious.

32 Clare McGlynn “Feminist activism and rape law reform in England and Wales: A Sisyphean struggle?” in Clare McGlynn and Vanessa E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 139 at 149. See also Amanda Clough “Finding the Balance: Intoxication and Consent” (2019) 40 *Liverpool LR* 49 at 63: “Without physical resistance as a proxy for non-consent, and a hazy memory, the extremely intoxicated victim seems to be heavily lacking in protection of the law”.

33 The sentencing decision in this case is available on a legal database.

It seems to us, contrary to the existence of two separate inquiries in section 128A, that only unconsciousness or semi-unconsciousness can be the basis of a finding of incapacity – rather than being in a vulnerable and alcohol-affected, but conscious, state, as claimed by a number of other complainants:

Q: *How did you feel at, while you were there? How, what level of intoxication did you think that you were at while you were drinking [the straight bourbon]?*

A: *Um, I would've been intoxicated, I don't, I don't remember being there like, like I was there but I don't know how long I was there for, I – you know little blackouts and that yeah.*

Q: *Okay. So, are you saying that you don't remember a lot from [after] what was going on there?*

A: *Yeah, yeah. (Harete)*

In this case, because of the lack of complainant memory about the events, counsel for Harete applied for a discharge (section 147 of the Criminal Procedure Act 2011). The judge declined the application saying:

*The complainant's evidence is essentially that she cannot remember the act of intercourse, nor can she remember having consented to intercourse. For practical purposes, the whole of her evidence around the immediate act of intercourse and any consent or otherwise which might have accompanied it, is a blank ... [T]hese kinds of issues are for a jury to resolve, not for the Judge to intervene ... We have no way of knowing what the jury make of this evidence. The closest that the complainant can get to saying that she did not consent is that she was in a happy relationship and would not have consented to an unplanned and spontaneous sexual act with this defendant.*

As the Court of Appeal stated in *R v Hong*,<sup>34</sup> a successful appeal from a decision to discharge the defendant on a similar set of facts, an inability to prosecute cases in which the complainant has no memory of what occurred due to intoxication, would undermine the policy of section 128A:

*We accept the Crown's submission that the Judge's concern about the lack of evidence of what occurred after the complainant had been put to bed sits uneasily with sections 128A(3) and (4) of the Crimes Act [1961]. In our view his approach undermines the policy intent of those provisions. We say this because the Judge's finding turned upon the absence of evidence from Ms H of what happened while she was unconscious or asleep. But as the Crown submits, it would be perverse if the complainant's inability to provide details due to his or her unconsciousness or*

34 [2018] NZCA 97 at [34]; application for leave to appeal declined *Hong v R* [2108] NZSC 63 at [19].

*extreme intoxication rendered a prosecution unsafe. It must be open to the Crown to bring its case on a circumstantial basis, as it did here, to satisfy the evidential burden upon it to prove lack of consent and absence of reasonable grounds for belief in consent.*

In *Harete* the judge directed the jury in the following way about consent:

*The real issue in this case, of course, is consent and I need to tell you a number of things about it. First, that a true consent may be given reluctantly or hesitantly. It may be regretted afterwards. If consent is given even in that manner and provided no threats or force was involved then the act of sexual connection is not rape. Likewise, a true consent can be obtained as a result of inhibitions broken down by alcohol or drug consumption. An intoxicated consent is no less valid than a sober one provided it is consciously, knowingly and freely given.*

*One of the issues in this case is whether the complainant was so affected by alcohol that she was **not really aware of what was going on** to a degree where she was not capable of giving a free, voluntary and knowing consent. That is a matter for you to consider having heard the evidence and the submissions on the topic.*

We question the reference to an inquiry into whether the complainant was “not really aware of what was going on”. An intoxicated complainant may well be aware of what is happening, but is not in any state to physically or verbally resist, or give full, informed, voluntary and free consent.

The complainant in *Yamada* also gave evidence that she was “out of it”, unconscious and in bed when the defendant had sex with her:

- Q: *And at that time how are you feeling, you're upset but intoxication-wise, how are you feeling?*
- A: *Pretty wasted.*
- Q: *Why do you say you're pretty wasted, what were you doing, or what made you think you were pretty wasted?*
- A: *Ah, I was just holding onto the bathtub – trying to hold on and sit down on it ...*
- Q: *If we think of, I just want to think about your intoxication, you told us that you were unconscious. What do you mean by that?*
- A: *Like I was out, I wasn't able to do anything.*
- Q: *Okay, so you were out of it, out to it, sort of thing?*
- A: *Yeah.*
- Q: *Asleep?*
- A: *Yes ...*
- Q: *Okay, can you remember Rangi getting into bed that night with you?*
- A: *No.*



Q: *Why can't you remember these things?*

A: *I was unconscious. I didn't even know anyone was in the bed with me.*

Q: *What caused you to be like that?*

A: *Alcohol.*

In two other cases, the complainant reported being very intoxicated, and, in one of these cases, unconscious due to having also taking a sleeping pill, when she was woken by the defendant in her own house.

Q: *Do you recall how you were affected by alcohol, how were you feeling around midnight?*

A: *Um, I was, I don't know, I'd say wasted 'cos that's the term I use, pretty wasted, yeah.*

Q: *So, when you're wasted and someone is looking at you how do you look? How would you look to someone who was sober looking at you?*

A: *Oh, I don't know, yep, probably the same just, couldn't really walk properly, I guess ...*

Q: *How were you – you've told us what you had to drink, I think it's about 10 drinks, maybe eight bourbons, two vodkas, how were you feeling by the end of the night?*

A: *Ill.*

Q: *And when you say "ill", in what way, what part of you not feeling so good?*

A: *The room was spinning.*

Q: *Right. Okay. And did that result in you doing anything?*

A: *I went, I went into bed and I woke up twice to throw up. (Tait)*

...

Q: *Right, so you went back – you went to that alcohol shop three times and the third time, what did you buy then?*

A: *[A strong spirit].*

Q: *Okay, so you had a bottle and a half of [a strong spirit]?*

A: *Yeah.*

Q: *And that's 200 mls, is that right?*

A: *Yeah.*

Q: *You wouldn't happen to know the percentage of alcohol in [that]?*

A: *40 something.*

Q: *So how were you feeling around the point that you went for [another] trip to the liquor store?*

- A: Very drunk ...
- A: I woke up to Jeremy shaking me and saying my name and I asked, said to him, “What are you doing here? How did you get in here?”
- Q: And then what happened?
- A: I passed out.
- Q: What, in your experience with taking this medication, what’s the side effect of it or what are the effects of the medication you take in terms of sleeping?
- A: Obviously, the sleeping tablets help me sleep, so taken in conjunction with alcohol’s probably not a good idea so it just makes me sleep ...
- Q: So, this sleeping tablet, how effective is it for you?
- A: Very ...
- Q: What was your reaction when you woke to Jeremy on top of you with his penis in your vagina?
- A: Um. I was – I didn’t have a reaction. I passed out.
- Q: Was there anything that you said to him?
- A: No.
- Q: How come?
- A: I don’t know. Just, I think it just felt like a bad dream, I don’t know. (*Cropp*)

Section 128A(3) or (4) would seem to make it clear that complainants in this kind of state are unable to actually consent to sex (as opposed to “allowing” it to happen) – and so, unless this evidence is challenged, the prosecution has established a lack of consent to the penetration (the two elements of the *actus reus* of the offence). The fact that the defendants in all four cases above (*Harete*, *Cropp*, *Yamada* and *Tait*) were acquitted must mean that either the jury did not believe the complainant’s evidence, or that the prosecution could not establish that the defendant did not have reasonable grounds to believe she was consenting. The words of Luke McNamara seem apposite:<sup>35</sup>

*[D]espite the legislative provisions that are underpinned by a contrary policy purpose, some cases appeared to validate the position that a person can be both extremely intoxicated and nonetheless consenting to sexual intercourse, even in the face of [her] claim that [she] was not consenting.*

In *Jackson*, however, a case which did result in a conviction, the judge noted the variation in the evidence about how intoxicated the complainant was when she got to the party, but went on to say:

35 Luke McNamara and others “Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects” (2017) 43 Monash University Law Review 148 at 165.

*But what is pretty plain is that she was in no good state when she was put into the bedroom and that really is the important point because that is when the accused first came across her. He was not in a position to see what she was doing in the house before that or what sort of a state she was in. He had to take her as he found her when she was put on the bed beside him, and at that stage we know that she had fallen asleep on the grass having vomited and that she was put on the bed by her cousin and another person, and the accused was asked to look after her because she was “wasted” and a bucket was put down beside her. So that was how things were at least when she came to the accused’s notice.*

This part of the summing-up helpfully, we believe, reminds the jury to consider the state of the complainant at the time of the alleged offending, and of what the defendant knew about her level of intoxication *at that time*.

The defendant will often suggest, or indeed give evidence, that, despite her intoxicated state, the complainant behaved in a way that suggested she was consenting. For example:<sup>36</sup>

**Q:** *He will then say that you moved your hand down to where his jeans were, your hand down by his pants and you put your hand into his pants, which were done up reasonably tight so you had to use a reasonable amount of force, to stuff your hands down the front of his jeans and you started fondling his penis.*

**A:** *Ew, no.*

**Q:** *And he will say although he was surprised and taken aback, he actually quite liked what you were doing and he didn’t ask you to stop. So, that you carried on touching him for a while, do you remember that?*

**A:** *No.*

**Q:** *Then he will then say that after you’d been reaching over and you had your hand down his pants, that you then rolled over onto your, from your left side to your right side so that you were effectively facing him, and you started kissing him.*

**A:** *No.*

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36 See also the evidence of the defendant in one of the cases in the principal research (set out in the conviction appeal): “She then reached around and started playing with my penis through my underwear. I in turn put my hand down her pants and she placed her hand on top of mine. I then told her that there was condoms in the bedside drawer and she said to me, ‘No just do it’. I took that to mean that she wanted to have sexual intercourse with me so we both moved so that I could enter her vagina. We had sex for about four or five minutes and she – during this she asked me what my name was and whether I had any diseases. I told her my name was [ ] and that I was clean. She also asked about having a threesome with someone. I wasn’t sure who she meant and I don’t recall getting a response. We carried on having sex for a little while and then she started talking about having anal intercourse and she said to me: ‘Spit on my arse and put it in my arse,’ so I did as I was asked. She then, she then started, she said that she was, she asked me if I’d like to put it in her arse and said, ‘I’m going to come’. She then started moaning loudly and acting as if she was coming. I then withdrew and rolled over.”

- Q: *Well you can't remember, can you?*
- A: *I wouldn't do that.*
- Q: *Well –*
- A: *No, I wouldn't do that.*
- Q: *And he, when you started kissing him –*
- A: *No.*
- Q: *– he kissed you back, do you remember that?*
- A: *No.*
- Q: *And then he believed there was some kissing and the kissing carried on and some more touching, that you were both engaging in, do you remember that?*
- A: *No ...*
- Q: *He will say that you with your, that you, as you were facing each other, you leaned forward towards him, that you placed your left hand in the vicinity of his right shoulder and with your right hand you placed it on his crotch area and that you then kissed him, you pushed him, and what I mean, you tried to kiss him with an open mouth and using your tongue, what do you say to that?*
- A: *No, that did not happen.*
- Q: *Okay, he will say that he was taken aback by this and he didn't respond to your kiss and he pulled away from you, what do you say to that?*
- A: *It didn't happen, so how could –*
- Q: *Is it it didn't happen or is it you can't remember it happening?*
- A: *I know I didn't do that.*
- Q: *How do you know when there was so much of what happened you can't remember?*
- A: *It didn't happen.*
- Q: *How do you know that?*
- A: *Because I wouldn't kiss him, he's a dirty old man. (Yamada)*

In this case, the defendant was permitted to offer expert evidence that a person in an alcoholic blackout may behave in the purposive (and sexual) way that the defendant said she did (and not remember her behaviour). The judge directed the jury on the issue of consent, and the expert evidence offered in the case, in this way:

- [33] The complainant was consistent about her loss of memory, as to what occurred, from the time she sat on the bath, effectively, until she departed the property in the early hours of the morning, apart from a brief moment when she became aware of the accused having sex with her on top of her. She was adamant she did not consent nor would she have consented.

- [34] From the point of view of the accused, of course, he told us that he believed he was with a woman who encouraged him to have sex and she continued to be encouraging and receptive. He believed she was consenting and, in any event, he says he has reasonable grounds for that belief.
- [35] You will have to ask yourselves, “Did the complainant know what she was doing?” “How much alcohol had she consumed?” “Was she too drunk?” “Was she asleep?” Was she acting, in terms of alcoholic blackout, in relation to [the expert] evidence? “Was the accused a man who was taking advantage of a woman, who was in a vulnerable position?” “Did he really believe that she was consenting?” “Should she have been safe from such attention in his bedroom?”
- [36] The reality is that if she was asleep or unconscious, of course, she did not consent and could not consent to sexual activity. If she was *so drunk she was in no position to know whether to consent or not*, then you would be justified in finding that she did not consent. On the other hand, the fact that the complainant cannot remember what happened is not necessarily conclusive. People sometimes do things when they are drunk that they would not do when sober. A consent given by someone who is disinhibited by alcohol is still consent.

Some of these questions (at [35] above) are not that helpful to the task of the jury in these kinds of cases. What does it mean to be “too drunk”? Is this inviting some kind of judgement about her behaviour? “Should she have been safe from such attention”? Certainly, if such attention was unwanted, but that rather does beg the ultimate question. We query the focus on the complainant having to be “*so drunk* she was in no position to know whether to consent or not”. The inquiry should be – was she in a position to be able to effectively consent, regardless of the *level* of her intoxication?

Further alternative meanings that are made of complainant intoxication are either that the effect of the alcohol at the time now makes her an unreliable witness (and so in this way, also relevant to credibility – see further Chapter Eight),<sup>37</sup> or that the alcohol made her uninhibited and therefore she was acting in a manner consistent with giving consent:

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37 The fact that a complainant’s level of intoxication can support an inference that she lacked the capacity to consent, while also allowing challenges to be made to her reliability and accuracy, is “one of the ways in which evidence of complainant intoxication may be said to be a double-edged sword in sexual assault cases”: see Luke McNamara and others “Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects” (2017) 43 Monash University Law Review 148 at 167; or a “catch-22” – “the complainant who is not intoxicated enough to be considered incapable of consent, yet too intoxicated to be considered a reliable witness”: see Janine Benedet “Judicial Misconduct in the Sexual Assault Trial” (2019) 52 University of British Columbia Law Review 1 at 53.

- Q: Now, I'm sure most members of the jury have had some alcohol in their lives, would you agree that when you've had a bit to drink, or people in general, you sometimes do things that you might not otherwise do?
- A: Um, I'd say when you've had too much –
- Q: Sure.
- A: – people do do silly things.
- Q: Yes and sometimes that's what's fun about having a few drinks, it lowers your inhibitions, right?
- A: Safe fun is good, yep.
- Q: Yes. And I don't know whether you've done this yourself, but your friends might've, sometimes you do things that are a bit embarrassing –
- A: Sometimes –
- Q: – when you've had a few drinks?
- A: Yep.
- Q: Sometimes you might go a bit further than you normally would?
- A: Okay.
- Q: Might embarrass yourself in front of other people?
- A: Okay.
- Q: Sometimes when you've had a few, people have a few drinks they regret what they've done afterwards? Would you agree?
- A: Some people do, yes. (*Nash*)
- ...
- Q: But do you also remember being sort of happy and giggly as a result of the alcohol?
- A: Um, I can't remember being giggly but, um, I was happy, yes ...
- Q: Now you know how alcohol sometimes lets people do things that they might not otherwise do, it's sort of can loosen you up, can't it?
- A: (no audible answer)
- Q: Do you agree that having alcohol can sort of loosen you up?
- A: Yes.
- Q: Can make things seem a bit funnier, can't it?
- A: Yes.
- Q: Yes, if you're in the right mood, of course, it can make you feel happier because of the sensation it gives you, can't it?
- A: Yes.

- Q: *And do you agree that it can make people friendlier, chattier, they speak more if they've got a bit of alcohol on board?*
- A: *Yes.*
- Q: *And in your case, alcohol can have that sort of effect on you as well, make you happier, friendlier, chattier, can't it?*
- A: *Yes.*
- Q: *And you know that alcohol can also be a disinhibitor, can't it? Do you know what I mean by that?*
- A: *What, what do you mean by that?*
- Q: *I'll explain it to you. It can make you relaxed, loosen up and do things that you might not otherwise do –*
- A: *Yeah.*
- Q: *– so normally if you haven't had any alcohol you'd be unlikely to kiss a stranger, do you agree?*
- A: *Yes.*
- Q: *But, you know, if you have a bit of alcohol on board, kissing a stranger is exactly the sort of thing that could happen, isn't it?*
- A: *Yes ... (Simon)*
- ...
- Q: *Do you accept that you make dumb decisions when you're drunk?*
- A: *No.*
- Q: *Well, the decision to drive drunk, at more than one and a half times the limit [in 2012], was that a dumb decision or not?*
- A: *Yes, that was a stupid mistake ...*
- Q: *Well I put it to you, Ms Sik, that when you've been drinking, I'll say, that you behave in a way that's out of character from what you are like when you're sober. What do you say to that?*
- A: *As in what behaviours?*
- Q: *Be silly, be laughy, giggly, pull open a guy's shirt.*
- A: *No.*
- Q: *You don't, so you don't, do you –*
- A: *I don't just go up to random people and pull open their shirts. (Yamada)*

The forensic value of these lines of questioning is reinforced in the commonly used direction that juries are given about consent:

*[C]onsent means true consent, freely given by a person who is in a position to make a rational decision ... If the complainant was so drunk that she could not consent or refuse to consent, then allowing the sexual activity to occur was not consent ... If she was so drunk that she was in no position to know whether to consent or not, then you would be justified in finding that she did not consent. But on the other hand, the fact that a complainant cannot remember or says she cannot remember everything that happened is not conclusive. **People sometimes do things when they are drunk that they would never do when sober. A consent given by somebody who is disinhibited by alcohol is still a consent.***

The final phrase formed part of the summing-up of 11 cases in the principal research – including all but one of the six cases in which the complainant gave evidence that she was so drunk that she had gone to bed or had been put to bed, prior to the alleged rape. Despite all of the cases in the Pilot involving intoxicated women who gave evidence of being in bed or asleep at the relevant time, this phrase was only included in the summing-up of three cases in the Pilot. In our view, such a direction (to the effect that a drunken consent is still consent), would be best followed by a repetition of the actual inquiry at issue – that is, whether the complainant was “in a position to make a rational decision”. We prefer the following statement about the impact of intoxication on consent (taken from one of the Pilot cases):<sup>38</sup>

*The fact that the complainant was under the influence of drink is not necessarily incompatible with consent. It is a matter of degree. What is essential for valid consent is that the complainant had an understanding of her situation and was capable of making up her own mind.*<sup>39</sup>

We see the need for the development of standard directions as to how jurors should use evidence of intoxication in considering the ability or capacity of a complainant to consent.<sup>40</sup>

38 See also the summing up-in *Vandenberg*: “There are some statutory matters that do not amount to consent and those circumstances include the following: the application of force to the complainant or another or the threat or fear of such application of force. Now there is no real evidence suggesting that here although at one point the complainant mentioned that the man had his weight on her and was holding her hands above her head by the wrists. Second, that the complainant is asleep or unconscious. Well that’s not suggested here. *Thirdly, that the complainant is so affected by alcohol or some other drug that she cannot consent or refuse to consent to activity. So, if you find there’s an issue of incapacity by reason of drink or drugs or other impairment, the question still remains the same question: “Has the Crown proved beyond reasonable doubt that the complainant did not in fact consent?”* Proof of incapacity would be just one of the factors that you’d take into account in deciding that”.

39 See also the summing-up in *Tait*: “People sometimes do things, members of the jury, when they’re drunk that they would not do when they were sober. A consent given by somebody who was disinhibited by alcohol is still a consent. *The essential issue is, did she turn her mind to what was about to happen and make some conscious, albeit impaired, decision to do so?*”

40 Faye T Nitschke and others “Intoxicated But Not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?” (2018) *Journal of Interpersonal Violence* doi: [10.1177/0886260518790601](https://doi.org/10.1177/0886260518790601).



### *Implication of evidence of the complainant being asleep to the issue of consent*

Section 128A(3) provides that a complainant does not consent to sexual activity when she is asleep. In a significant number of the cases in both the principal research and in the pilot study the complainant gave evidence that she was asleep and was woken by the defendant raping her, or even that she did not wake up until sometime later and discovered the physical effects of being raped. Despite this, we noticed that while there was often reference in the jury directions to the fact that a person who is unconscious or asleep is unable to consent, rarely was this inquiry related directly to the facts of the case. Because the complainant was asleep following a period of drinking, the focus of the trial and the summing-up tended to emphasise the impact of intoxication on her ability to consent, not on whether she was asleep at the relevant time. An inquiry into whether she was asleep, as opposed to an inquiry solely into whether she was “so affected by alcohol” should, in our view, be encouraged when the evidence is that she had been put to bed and went to sleep.

In only two of the seven cases from the principal research in which the intoxicated complainant said she was asleep or “out of it” at the time, and in four of the ten Pilot cases, was the jury directed to consider whether the complainant was asleep (in order to make the decision as to whether she had consented).

In *Schuetze*, the judge referred to the Crown’s position, both in summing up and (helpfully we believe) in the question trail, “that by the time [the defendant] came into her room on the second occasion [the complainant] was asleep, affected to some extent by alcohol and the pain relief medication and was in no position to consent or otherwise”. However, there is a less clear statement of the content of section 128A(3) (“A person does not consent to sexual activity if the activity occurs when he or she is asleep or unconscious”) in the summing-up:

*Allowing sexual activity where the complainant is asleep does not amount to consent. The critical issue must always remain: “Has the Crown proved beyond reasonable doubt that the complainant did not in fact consent?” Proof of incapacity by sleeping of course is relevant.*

In our view the legislation makes it clear that not only is evidence that the complainant was asleep relevant evidence of incapacity – but importantly that a sleeping (or unconscious) person “does not consent”. This point (that an unconscious person cannot consent) is made more expressly in other directions in cases in which the complainant gives evidence of being intoxicated, but most of those directions did not include the need to consider whether an intoxicated complainant was actually **asleep** at the relevant time. The directions on the relevance of sleep are clearer in those cases in the research in which the complainant’s evidence was that she was asleep (rather than in a heavily intoxicated state):

*Here on the issue of consent the Crown say she was asleep when his penis went into her genitalia. Our law says that a person does not consent to sexual activity if the activity occurs while she is asleep. So, this must be the focus of your enquiry. Has the Crown proved beyond reasonable doubt that at the time [the defendant] put his penis into [the complainant's] vagina she was asleep? (Moss)*

However, in the question trail given to the jury in this case, the impact of sleep on consent is not mentioned (which only includes a reference to section 128A(1), also at issue in the case):

*That the penetration was without the complainant's consent; consent means true consent, freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent ...*

In *Kata*, a Pilot case, the complainant (Louisa) gave evidence that she was asleep when the defendant sexually violated her and this evidence was referred to in the summing-up only with regard to his belief in her consent:<sup>41</sup>

*[I]f you accept what the complainant says, that she was asleep when her anus was penetrated by the defendant, you may very well think that it would have been impossible for the defendant to have believed that she was consenting and in those circumstances he could not reasonably have thought that she was consenting.*

In the question trail in *Kata* there is no specific reference to section 128A(3) regarding whether the complainant did consent – only to three subsections in section 128A not at issue on the facts of the case:

## **2. Are you sure that Louisa did not consent to that act?**

*“Consent” means true consent freely given by a person who is in a position to make a rational decision. There is no presumption of law that a person is incapable of consenting to sexual connection because of age. Lack of protest or physical resistance does not, of itself, amount to consent. There are some circumstances where allowing sexual activity does not amount to consent including:*

- (a) the application of force to a complainant or the threat or fear of such application of force; or*
- (b) the complainant's intellectual or mental development is such that she cannot consent or refuse to consent to the activity; or*
- (c) the complainant is mistaken about or incapable of comprehending the nature and quality of the act of sexual activity.*

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<sup>41</sup> See also the summing-up in *Redman*: “The Crown invites you to draw an inference from all the circumstances that Mr Redman knew or should reasonably have known that Ms Rose was asleep and unable to consent to sexual intercourse and once she awoke, she made it very clear she was not consenting to sexual intercourse continuing. Whether you draw this inference is for you to decide, as are all matters”.

In *Masters*, another case in which the complainant gave evidence that she was asleep (not after becoming intoxicated) when the alleged rape occurred, the following statement was included in the question trail:

*Here, on the issue of consent, the Crown say she was asleep when his penis went into her genitalia. Our law says that a person does not consent to sexual activity if the activity occurs while she is asleep. So, this must be the focus of your enquiry – has the Crown proved beyond reasonable doubt that at the time he put his penis into her vagina she was asleep?*

We are of the view that this type of statement should be included in directions and question trails when one of the issues at trial is whether the complainant was asleep (even as a result of drinking heavily) at the time the penetration occurred, as well as a reference to the content of section 128A(3).<sup>42</sup>

### ***A failure to struggle or cry out or leave immediately as relevant to consent***

While in many of the cases in the principal research, the complainant gave evidence of physical resistance and verbal cues, the *failure* to be more resistant, louder or more immediate in her response was often explored in cross-examination to lay the foundation for an inference that she was actually consenting. See for example in *Moss*:

- Q: *So, you lay there as a brick, didn't move, had your eyes squeezed shut and wanted it to be over is not how it happened for you in your claim of this rape?*
- A: *Those are not my – that – I've done my best to describe my ordeal sir.*
- Q: *You were about to say those are not your words Ms.*
- A: *Well they may be words from a statement I remember, I, sir I've done the best to describe what happened during that time, to you.*
- Q: *That's what you said to [the police officer]? Was it incorrect?*
- A: *I have done my best to say as much as I can say.*
- Q: *[Your friend] said she thought you would have kicked and screamed and you said you thought you would have too, does that refresh your memory?*
- A: *In doing [my job I've heard of] cases like this and I always said to myself if that ever happened to me, I would fight and until I was in that situation myself, I had no idea what those people went through.*

<sup>42</sup> For example, from an expansion of consent in a Pilot case – it was unclear from the file if this document formed part of the question trail: “A person who is half-asleep, not fully awake, could only give valid consent if she had the then capability to understand what is happening to her, or is about to happen to her and had the then capacity to make a full, voluntary, free and informed decision whether or not to consent. The basic test is that what will always be essential for there to be a valid consent is that a complainant understood her situation and was capable of making up her mind when she agreed to sexual acts”.

**Q:** *That never happened to you though did it?*

**A:** *Yes, it did.*

This form of challenge also occurred in the Pilot cases, when complainants, intoxicated or asleep at the time the alleged offending began, were asked why they did not react in a particular (resistant) way once they became aware of the defendant's actions. In one Pilot case, counsel for the defendant explicitly made the connection between a lack of shouting out and an inference of consent (emphasis added):

**Q:** *Do you agree that if you were not happy or consenting in terms of what was going on with Mr Waititi, it would have been very easy to end what was going on by simply shouting out?*

**A:** *Yes, that always seems like the obvious easy thing that would happen, but I don't think that happens in every case. I think people's reactions to situations is often completely different to what they think it would be.*

**Q:** *The reason why you didn't scream and the reason why nobody heard what was going on in the room that night is because right up to the very end of your interaction with Mr Waititi whatever is occurring between the two of you was consensual, correct?*

**A:** *No, that wasn't the case. (Waititi)*

In this case the complainant gave evidence that she had got very drunk and had gone to bed, waking to find the defendant having sex with her. She was challenged about her lack of resistance, once waking, on a number of occasions, including how easy it would have been for her:

**Q:** *Well there's certainly no suggestion from you in the account you gave to the police about this third version that you resisted in any way about the removal of the clothing, is there?*

**A:** *No, I suppose I haven't mentioned that I resisted.*

**Q:** *And in terms of a resistance, I mean by simply bending one knee it would become extremely difficult to remove a pair of jeans of that type, wouldn't it?*

Similar questions were put to the complainant in the Pilot case of *Salah*. She also gave evidence of waking up to find someone having sex with her, but in her case, she was too intoxicated to identify him (the defendant was eventually identified through DNA evidence) or to resist:

**Q:** *Now you do remember your pants being pulled down, correct?*

**A:** *Yes.*

**Q:** *Which means you were awake when that occurred, correct?*

**A:** *Yes.*

- Q: *Why did you not resist that?*
- A: *I didn't resist anything, I just didn't really react in any way. All I can remember is pretty much just lying there, 'cos I was just like out of it. Like I came to and I had consciousness, but because I was just so in and out of it and I was so drunk I just had no motor skills. I just didn't, I don't remember moving arms or anything I'm sorry.*
- Q: *Do you remember him pushing into you hard, do you remember that?*
- A: *I definitely remember that.*
- Q: *Why did you not do or say anything then?*
- A: *I don't know.*
- Q: *Okay. ... There were other people in the house that you trusted and knew?*
- A: *Yeah.*
- Q: *Would this have been a chance to call out possibly?*
- A: *I wish I had.*
- Q: *But from your answer I understand you accept that you didn't call out?*
- A: *Yeah, I didn't.*
- Q: *And at no stage you pushed this gentleman away from you?*
- A: *I just didn't do anything, I didn't move. I don't remember touching him. (Salah)*

*Edwards*, a case from the principal research, also involved a complainant who gave evidence that she became very intoxicated during the course of an evening socialising with friends at the home of the defendant, and went to sleep in the spare room, with assistance from her friends. She said that she woke to the defendant in bed with her, performing various sexual acts on her. She was asked about why she was not able to more effectively physically resist:

- Q: *What about when his penis was in your mouth, how long would've that been?*
- A: *About the same.*
- Q: *About 15 minutes?*
- A: *Or longer.*
- Q: *You mentioned that it came into your head that, to bite his penis?*
- A: *Yes.*
- Q: *You couldn't manage to do that during those 15 minutes?*
- A: *No.*
- Q: *Why was that?*
- A: *He kept forcing it too far and it was hurting.*
- Q: *And I think my friend suggested and you agreed that it was, towards the back of your throat.*
- A: *Yes.*

Q: *Was it always at the back of the throat or was it ...*

A: *No.*

Q: *So, you don't think, if that was what you were trying to do, you would have been able to achieve that during that period of time?*

A: *No. (Edwards)*

In closing for the defendant, counsel submitted “that if [the defendant’s] penis was in [the complainant’s] mouth for that long that it would be consensual”.

In another case from the principal research, the complainant had been drinking while out with friends and gave evidence that she had a patchy memory of the night after becoming intoxicated, but remembers trying to resist the defendant when he raped her in a carpark:

Q: *And throughout this there was no struggle from you, no physical resistance to what was happening was there?*

A: *Just the fact that I'd said no. He was – as you can see, he was considerably larger than myself and I didn't want to be hurt.*

Q: *So, your clothing wasn't damaged or torn in any way was it?*

A: *No.*

Q: *Your dress was still intact?*

A: *Yes.*

Q: *Your underwear was still in one piece?*

A: *Yes.*

Q: *He was able to remove your underwear, you didn't try and hold your legs apart or anything to stop that?*

A: *Not that I remember, no. (Vandenberg)*

Lack of evidence of the complainant struggling or calling out is also characterised as consistent with consent during closing argument – further in this case, that a reasonable person would behave in that way:

*The issue though is whether in the circumstances we had here you would've expect maybe anticipated she might have put up a struggle, may have said something. If you thought it was reasonable that she should've done something like that then it probably helps you decide the issue of whether or not she's consenting. (Devi)*

Lack of struggle or resistance was also sometimes argued as relevant to credibility – the fact that there was no resistance meaning it was not rape, it was sex:

*What is interesting about her entire account in the bedroom is the absence of any resistance whatsoever. There are no attempts to leave. There is no shouting. There is no struggle. There is absolutely nothing. Where that becomes significant, ladies and gentlemen, is in circumstances where her failure to do anything occurs in circumstances where there is no force, no violence and no threats. That's the part of this entire story which just does not add up. It doesn't add up. (Perez)*

Section 128A(1) however provides that: "A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". We therefore looked at how judges managed the legislative context with the meaning made of lack of resistance when summing up. For this purpose, we focus on the four cases of which we have set out an extract from the cross-examination of the complainant (see above).

In the three cases in which the complainant gave evidence that she woke up to the defendant raping her, and was challenged about the extent of her resistance at that time, the judge did refer to section 128A(1) during the directions to the jury:

*The fact that a woman does not protest or physically resist or ceases to do so is not, of itself, to be taken as consent. (Edwards)*

*Lack of protest of physical resistance does not, of itself, amount to consent. (Salah)*

*Lack of protest or physical resistance does not, of itself, amount to consent. (Waititi)*

However, nothing more was said about the challenge to the complainant's evidence on that basis (lack of resistance) and there was no reference to any aspects of section 128A in the question trails of any of the three cases.

In the last case, in which the complainant gave evidence of being intoxicated but was not asleep or in bed at the time of the alleged offending, she was questioned a number of times about her lack of resistance. In the jury directions (and question trail) of this case (Vandenberg) the judge also referred to section 128A(1):

*Allowing sexual activity does not amount to consent in some circumstances. For instance, a woman does not consent to sexual activity just because she does not protest or offer physical resistance to the activity.*

No more was said about the inference the defendant invited the jury to draw about the lack of resistance (in particular to counter that suggestion), but the judge did go on to direct the jury that lack of resistance might be relevant to the assessment of the reasonableness of the defendant's belief in consent:

*Lack of protest or physical resistance does not of itself amount to consent although the circumstances of course might be relevant to the issue of what the accused believed.*

This direction appears to undermine the policy behind section 128A(1), without further clarity on what (other) circumstances are relevant. The Supreme Court in *Christian* confirmed that:<sup>43</sup>

*If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.*

In *Christian*, the “something more” that might indicate consent in the face of passive silence may be something other than a positive expression of consent – but did not define what those circumstances might be beyond “relationship expectations”.<sup>44</sup> Relationship expectations certainly could not have existed in *Vandenberg*, as the complainant and the defendant “met” for the first time at a nightclub the evening of the alleged rape. A direction consistent with the decision in *Christian* was given in the Pilot case of *Lowrie*:

*Consent cannot be inferred only from the fact that a person does not protest or physically resist. There has to be something more in, for example, words used, in conduct or in the surrounding circumstances, or a combination of those things, before it would be legitimate to infer consent.*

The kinds of circumstances that could be focussed on are referred to in the Pilot case of *Lino*, as well as reminding the jury to draw on their own life experiences:

*[L]ack of protest or resistance does not of itself amount to consent, but together with other supporting behaviour or circumstances it may, and evidence of other supporting behaviour or circumstances may come from the defendant, or it may come from the complainant, or it may come from exhibits which you have seen photographs or the like or other sources, so long as you accept it. So, it is a wide inquiry that you have to take into account ...*

*Paragraph 4, and I referred to this and have taken it from the preliminary remarks I made: “The law says that a lack of protest or resistance does not of itself amount to consent, but experience of life will tell you that in some instances, together with other supporting behaviour or circumstances, it may”.*

*Now this case probably comes down to that paragraph 4, what this is about. The concept or the analysis of the facts within the circumstances of these two seventeen-year-olds where there is an apparent lack of protest or resistance, that*

43 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [32].

44 At [46]. See the critical analysis of Andrea Ewing “Consent and ‘Relationship Expectations’” [2017] Te Wharenga New Zealand Criminal Law Review 357 and Emily Blincoe “Yes, no or maybe? The ‘odd’ result in *Christian v R*” (2018) 2 New Zealand Women’s Law Journal Te Aho Kawe Kauapapa Ture a ngā Wāhine 265 on this issue and the discussion at [248](#) (above).



*is a matter which you will have to decide for yourself, and you have to decide whether in the context of everything that has happened, as well as what happened at the moments when consent was required, whether there is that supporting behaviour or circumstances?*

In our view, this direction very much encourages the jury to be looking for circumstances that might suggest that the complainant's lack of protest *did* amount to consent (a relevant "something else") – even though the two met for the first time in person on that night. Prior to the night of the alleged rape they had attended the same school but only knew each other through social media.

We support the development of a "counter-intuitive" direction that will address the widely held belief that victims of sexual offending, including rape, will put up a good fight. In fact very few people will physically resist the attack, even those, like the complainant in *Moss*, who thought they would do so – before they got in that situation: "I always said to myself if that ever happened to me I would fight and until I was in that situation myself I had no idea what those people went through". The reason for the lack of physical resistance is related to the physiological and psychological responses, a consequence of which is that a person under attack is more likely to freeze or flop, rather than fight.<sup>45</sup>

*A lack of physical resistance is therefore normal and often out of the victim's conscious control (as their primitive brain takes control in life threatening situations). It is worth emphasising that at the time the victim is simply trying to survive – they are not thinking about how their behaviour will look to anyone after the event or when they give evidence in court. Like us, the victim may also have thought that if they were ever attacked, they would fight off their attacker.*

### ***Lack of force or threats used by the defendant as consistent with consensual sex, not rape***

In a number of cases in the research it was put to the complainant that the defendant did not use force or make any threats, as part of, or before, the alleged rape. While it is not always apparent what the relevance is of these questions, or of the evidence given in response, it could be argued that its relevance stems from the assumption that rape (as opposed to consensual sex) will involve force or threats. Given the contestable nature of such an assumption, rendering the evidence irrelevant for that purpose, it remains unclear why the questions were permitted – see, for example:

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45 Nina Burrowes *Responding to the challenge of rape myths in court: A guide for prosecutors* (nbresearch, London, 2013) at 19 and 28. See also Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 15–17 [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf)

Q: See, I'm putting to you that at that time you're enjoying having sex with him?

A: I don't think so.

Q: See, at no stage was Mr Ahmed violent towards you, was he?

A: No, he wasn't actually.

Q: See, I'm suggesting to you that at no stage did he even hold you down did he?

A: Yes, he did actually.

Q: But Mr Ahmed at no stage threatened you, did he?

A: No. (Ahmed)

...

Q: And there's no suggestion from you that he was talking to you in a threatening manner?

A: I don't remember what he was saying.

Q: But there's no suggestion from you he was talking in a threatening manner, correct?

A: No.

Q: He wasn't threatening to harm you in any way?

A: Not that I remember.

Q: He didn't attempt to prevent you from speaking by placing his hand over your mouth or anything like that?

A: No.

Q: There's no attempt to place any physical restraints on you?

A: No. (Waititi)

...

Q: There were no threats from Mr Patel, "If you scream out or make a noise, I will kill you"?

A: No.

Q: – "or hurt you," or anything like that?

A: No.

Q: There was no threats of violence at any stage by Mr Patel, was there?

A: No.

Q: And while you were having sex with him, you were actually texting on your phone, weren't you?

A: Yes.

Q: Do you recall that?

A: Yes.

Q: You could have, if you wanted to, had your phone with you and he didn't grab that from you, did he?

A: Yes.

Q: Because you could have dialled or pressed 111, couldn't you, and said, "I'm being raped."

A: I could have.

Q: You could have, but you decided not to do that?

A: No.

Q: You decided not to do that because you weren't being raped, were you?

A: Yes.

Q: You were having consensual sex?

A: No. I decided not to do that because I was scared.

Q: Well, how could you be scared? (*Patel*)

The claimed connection between the lack of violence (and the consequential ability to avoid the rape) and the existence of consent was made very clearly in the defence closing in *Patel* and in *Ahmed*:

*There was no suggestion that there were any threats. No suggestion of any violence. At that stage she could have attempted to walk away, she could have closed her legs, she could have sat down. Why didn't she do that? That could have avoided any sexual – that could have avoided Mr Patel penetrating her. Now the reason why she didn't do that is because the sex was consensual. Easy, easy to avoid. There were no abrasions, no bruises, no scratches relevant to the incident. No ripped clothes.*

*But equally and as she says, there [was] no violence. Page [ ] of the notes: "There was no violence." And when you're looking at, and what does this man believe or was he believing on reasonable grounds, well, there's no violence. I asked her, "Well, were there any threats?" There were no threats. See, what Mr Ahmed was doing was having consensual sex with the complainant.*

In the third case example, *Waititi*, the encouraged inference that the lack of threat is indicative of consent was argued in a slightly different way, with the suggestion that the penetration would only have been possible if the (older and taller) complainant was consenting:

*You might ask yourself how could it be possible that penile penetration of the vagina could occur with an individual who is not acting in a threatening way and is not physically restraining the complainant? There was evidence that he had his hand on her chest but on the physical restraint tick box in the medical notes she confirmed there was no physical restraint.*

On this issue also we looked at the extent to which the judge addressed the contestable nature of the link between lack of force or threats and consent. In these three cases (two from the principal research and one from the Pilot), there is no comment by the judge as to the permissible use to be made of this evidence. In *Ahmed* the judge referred to the defence submission on the relevance of lack of threats, but said nothing more about this evidence:

*He pointed out that there was no violence suggested here, no threats and that there was no need for any forceful behaviour on behalf of the accused.*

In *Patel*, the judge did not refer to the defendant's submissions on the use to make of the lack of threats or force, but includes a reference to the prosecutor's argument on the point, saying that she was scared of him (a much older and heavily built man), even though he did not threaten her:

*And although he made no threats, she was scared of him and she just froze but in view of her rejections in the lead up, he knew very well that she was not consenting to that sex.*

Similarly, in *Waititi*, the judge did not refer to the submissions of the defence about the inferences to be drawn from the evidence that the defendant did not use force.

In our view, it would be preferable to deal with the relevance of such questions or evidence at trial, or respond to defence submissions on the point, by making it clear that rape can occur (as a matter of law) even without the use of force, and that a lack of force or threats by the defendant is insufficiently probative to the issue of consent. The variation in complainant response to perceived harm even in the absence of articulated threats should also be the subject of counter-intuitive directions.

### **Complainant clothing and underwear choices as consistent with consent**

*Concern has been raised about the admissibility of a woman's clothing as evidence of consent – I pause to observe at this stage that there is no doubt that the clothing a complainant is wearing has no relevance whatsoever to whether she consented or not. That is one of the rape myths that needs to be robustly dispelled. However, it is right to say that there may be instances where clothing which, for example, is torn or bloodied might be relevant to the issues in the case. Accordingly, a hard and fast rule excluding clothing as evidence would not be possible, but I agree entirely that it should not be permitted to be produced in order to determine whether or not consent was given as a general rule.<sup>46</sup>*

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46 Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1 (Department of Justice, 2019) at 88–89 <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>

We agree with this statement. Evidence of what the complainant was wearing at the time, or on previous occasions in the presence of the defendant, is irrelevant to consent, and, we would say, the defendant's reasonable belief in consent. However, in this research there were a number of cases in which the complainant was asked questions about what she was wearing – primarily during cross-examination, but also by the judge. In some cases the question may have been related to an argument about how easy it was for the complainant to get or be undressed, however, we are of the opinion that even in that context such evidence is irrelevant as the inference to be drawn seems to be a requirement to struggle or resist getting undressed. In the other contexts, it is unclear why what the complainant was wearing was relevant – except (impermissibly) to the issue of consent or belief in consent. We list some of the 10 examples (from both the principal research and the Pilot cases) below:

Q: *Isn't it the case that the three of you [including the defendant] went inside and you lay on one of the couches in just your bra and your underwear?*

A: *No, I had the towel around me.*

Q: *Well evidence will be given by [the defendant] and he'll say that you were lying on the couch in just your bra and your underwear. What would you say to that?*

A: *I had a towel around me when I rolled over, as far as I know, the towel was still around me. (Cropp)*

...

Q: *And what were you wearing when he turned up at about 5 o'clock that morning?*

A: *Um, I was wearing my white men's dress shirt with buttons and a collar and my pyjama pants.*

Q: *So, when you invited him over that's what you were wearing when he got there?*

A: *Yeah, we were just all lounging around in the lounge.*

Q: *And what about a brassiere? Did you have one of those on this time?*

A: *Yes.*

Q: *Are you sure about that?*

A: *Ah. I don't know. ...*

Q: *And just remind us what you were dressed in [the next time] he arrived at the house?*

A: *A t-shirt and pyjama pants.*

Q: *Right. And you had known this guy what, for three days or four days at this stage?*

A: *Yes, but it wasn't like I was dressed up, it wasn't like I was implying anything. (Masters)*

...

Q: *And you came back to the party wearing that black dress that you sometimes wear to work?*

A: *No.*

Q: *In fact, the reason you have something white underneath it is it's very short, is that right?*

A: *What do you mean the reason – I didn't wear a black dress. I don't know what you're talking about something white.*

Q: *Your black dress is a very short dress, isn't it?*

A: *No. I wouldn't wear a short dress to work. I don't – I didn't wear a short dress to the party. (Moss)*

...

Q: *The fishnet stockings were ripped. After it you talked to him about that, as a kind of a buzz to have the fishnet stockings with a hole in the crutch?*

A: *Tha –*

Q: *And, you know, to get excited about having sex that way, through the fishnet stockings?*

A: *This is all – all his doing.*

Q: *All his doing?*

A: *He – he ripped the tights. It was not my decision.*

Q: *It wasn't your decision?*

A: *No.*

Q: *But you talked about it though, didn't you?*

A: *Nuh.*

Q: *So, you had sex with the fishnet stockings when they were ripped?*

A: *Pardon?*

Q: *You had sex – you and he had sex with the fishnet stockings on with a hole in them around the crutch?*

A: *Yeah, he had sex with me while there was a hole in [my] tights. (Walters)*

In none of these cases was there an objection to the question being asked – however in *Moss*, the Crown did object to references about the complainant having photos of her dressed in a bikini earlier in the evening before the alleged rape taken and sent to friends – which was resolved in the following way in the absence of the jury:

JUDGE: *Can't it simply be approached then – it's barely relevant in my view – can't it be dealt with then on this basis: that the bikinis in the photos you had been trying them on earlier that afternoon, when you got out of them you didn't put any underwear back on?*

**DEFENCE:** *Thank you, Your Honour – and they are those [the underwear] in the bathroom.*

**JUDGE:** *And that is as far as it goes. I appreciate what the Crown is saying but I do not think it offends against any propriety if it is put simply on that basis.*

In *Roberts*, defence counsel asked the judge in the absence of the jury for a number of photographs to be put back into the booklet to be shown to the jury, including ones showing how the complainant was dressed close to the time of the alleged offending:

**DEFENCE:** *Sir, [the photo] also has some relevance in that it shows that she has adopted a relatively youthful style of dressing notwithstanding her age; she's got black boots with tassels and black leggings and a fairly short skirt for a woman of that age, so it is my respectful submission that it would be helpful if the jury could see that. I'm not sure why it got taken out, if it were to be put back in I don't suggest we should have a new book of photos because I don't wish to embarrass the Crown but if perhaps those three photos could be made available in some way separate from the book of photos, I just think they will be of some help.*

**JUDGE:** *Well I don't think there is anything that can prevent them from being shown to the jury but in fact I will give [the Crown] an opportunity to be heard.*

**CROWN:** *Sir, I suspect they were taken out because at the time they were photographed there was nothing relevant to show in the photograph of the complaint some four days after but there is no problem getting those three photographs prepared as a separate booklet overnight, Sir.*

We are unsure, based on this discussion, why the photographs would be “of some help”, given the issues at trial, although more is said about her clothing as relevant to the nature of her relationship with the younger defendant in the summing-up (see below).

In four of the cases, reference to the complainant's clothing was made in the closing submissions of the defence:

*Now we know that when he gets to [the complainant's flat] just after 5.00 am the complainant is at the door and greets him with – and gives him a hug. She's dressed for bed with her leopard pants, floppy white man's shirt on that she'd been wearing in town and it would seem no brassiere. (*Masters*)*

In four cases (*Cropp*, *Lino*, *Edwards* and *Masters*) there was no reference in the summing-up to the evidence about what the complainant was wearing, or the use to be made of such evidence. In *Roberts* the judge referred to the defence submission about the relevance of what the complainant would wear as relevant to the nature of the relationship between her and the defendant:

*He submitted to you that she had acted much younger than she in fact is and he submitted to you that that was clear in the way that she dressed, it was clear also in the terms of her wishing to be, appear the same age as her thirty-four-year old daughter and so that she had acted in a way which was much younger than her chronological years and he submitted that therefore the gap between the age of the accused and the complainant was a gap in terms of calendar years but was not a gap in terms of attitude and approach to life and so that the relationship that the accused had spoken of was a relationship in a sense between persons of a similar attitude in terms of age or mental attitude towards age.*

In *Walters* the judge also referred to the link made in the defence closing between the ripping of the complainant's fishnet stockings and her consent to having sex with the defendant:

*[The defendant said] that [the complainant] instigated consensual sex from the outset. He went along with it, they had sex in his bed, on the bedroom floor, and then in the lounge. He said that he would never force anal sex on anyone. "The only sex I had was vaginal." She allowed him to rip her fishnet stockings and she went along with the idea of moving into the lounge and having sex there.*

While the judge in this case was referring to a submission of the defendant, we consider that there should have been some counter given to this invited inference in the judge's summing-up.

Finally, in *Moss*, the judge set out the evidence offered by the defendant about what the complainant was wearing, allegedly changing her clothes before returning to the party:<sup>47</sup>

*Mr Moss called three partygoers and you must consider their evidence as well, as you must consider, assess and weigh all of the evidence in the case ... This evidence related in particular to the behaviour of [the complainant] and what it is said she was wearing at the party. Was there a change of clothing? Was there bending over in the short dress, showing no underwear? Was she all over the accused? How you answer those questions will bear on your assessment of [the complainant] herself because she, as the Crown reminded you, was adamant that she did not change, and apart from flirting with Aaron, says she did not act inappropriately in any manner. ... One of the partygoers said [the complainant] got changed a few times and described a top worn by [her] as a dress and that she could just about, or could, see [the complainant's] bottom.*

<sup>47</sup> See also the discussion of this case in Chapter Five at 134, with regard to the "inappropriate" flirting of the complainant.



In this part of the summing-up the judge seems to categorise the inquiry into whether the complainant was wearing a short dress with no underwear as relevant to her credibility, as opposed to the issues of consent or belief in consent. In our view, there should be caution around the admission of evidence that may encourage impermissible inferences about consent on the basis that it is argued as being relevant to credibility. In this case, the complainant denied wearing a short black dress to the party, and the partygoers (witnesses for the defendant) had dishonesty convictions. We discuss this issue further in Chapter Eight.

In one Pilot case the prosecutor questioned the complainant about what she was wearing on the night of the alleged offending, including a question as to how wearing a sanitary pad might have impacted on her decisions to engage in any sexual activity that evening:

- Q: *Now can you look at photographs [ ], again photograph [ ], is that a photograph of the jeans you were wearing?*
- A: *Yes.*
- Q: *And photograph [ ], is that a close-up of the jeans you were wearing?*
- A: *Yes.*
- Q: *Can you see your underwear in that photograph?*
- A: *Yes.*
- Q: *And what else can you see?*
- A: *A sanitary pad.*
- Q: *And is that on your underwear?*
- A: *Yes, my underwear are black.*
- Q: *Did you have your period that evening?*
- A: *Ah, I didn't have my period but it was due at the time, so I ...*
- Q: *So just so we're clear, why were you wearing a sanitary pad?*
- A: *Because I was very sure that I would get my period that evening.*
- Q: *And do you get regular periods?*
- A: *Yes, my periods are very regular so I knew that it was going to be that day or very soon afterwards.*
- Q: *And do you ever experience spotting of blood?*
- A: *Occasionally yes.*
- Q: *As you had a sanitary pad in your underwear that evening, how did that affect your decisions that night in respect of any sexual activity?*
- A: *I didn't start my evening intending to have any sexual activity, but I will say that if I had've met someone that I was interested in I wouldn't have had sex with them because I would be concerned that I was going to get my period and that's not something you'd normally want someone to see. (Waititi)*

In this case, what the complainant was wearing is also linked with an inference about consent – in this example, **lack** of consent. The inference to be drawn is that it was unlikely that the complainant would have consented to sex given that she was about to get her period. Given the personal details the complainant needed to talk about in order to give this evidence some context (and therefore its relevance), we query whether it was a necessary or helpful line of questioning.

Our observations – about the ways in which consent is represented and how the behaviour of the complainant is scrutinised in order to expose the likelihood of her consenting – are consistent with findings of many other pieces of research that have focussed on the analysis of trial transcripts, court files and jury directions. While this is unsurprising, given that recent local research found no significant changes to the scope of cross-examination over time,<sup>48</sup> we do note that the types of claims made about what behaviour is consistent with consent **within** the trial process, are inconsistent with what is reported to the media **outside** of the trial process.<sup>49</sup> For example, the President of the New Zealand Criminal Bar Association recently stated “it would not be appropriate to question someone about what they were wearing”, or “ask random questions about someone’s sexual history when it is not related to the night in question”,<sup>50</sup> yet both types of questioning are apparent in these cases, including those in the Pilot.

With regard to evidence of what clothing the complainant was wearing at the time of the alleged offending or on another occasion, care must be taken to ensure it is relevant and sufficiently probative to an issue at the trial – not to the issue of consent or belief in consent. If submissions are made to the effect that clothing **is** indicative of consent, when admitted as relevant for another purpose, judges should respond by giving a limited use direction, or the matter should ideally be covered by counter-intuitive directions. We discuss the role of judges in resisting counsel reliance on contestable claims about the dynamics of sexual violence further in Chapter Nine.

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48 Sarah Zydervelt and others “Lawyers’ Strategies for Cross-Examining Rape Complaints: Have We Moved Beyond the 1950s?” (2017) 57 *British Journal of Criminology* 551.

49 See for example: “I can say that of course I don’t agree that what a woman wears has any relevance to consent. I absolutely agree [with] that and I would never argue that myself and I don’t know any defence lawyers who do try and argue and use those rape myths any more”: Annabel Cresswell, *Breakfast*, television interview with John Campbell, 16 May 2019. Elaine Craig documents a similar disconnect in her book *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018).

50 Len Andersen QC “What does the Criminal Bar Association think of the proposed changes?” reported by New Zealand Law Society, Weekly newsletter, Issue 159, 4 July 2019 [https://www.lawsociety.org.nz/news-and-communications/latest-news/news/what-do-some-barristers-think-about-law-changes-focusing-on-victim-protection?utm\\_source=NZLS+Weekly&utm\\_campaign=7712261cc2-EMAIL\\_CAMPAIGN\\_2019\\_03\\_06\\_08\\_11\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_899863399d-7712261cc2-39858325](https://www.lawsociety.org.nz/news-and-communications/latest-news/news/what-do-some-barristers-think-about-law-changes-focusing-on-victim-protection?utm_source=NZLS+Weekly&utm_campaign=7712261cc2-EMAIL_CAMPAIGN_2019_03_06_08_11_COPY_01&utm_medium=email&utm_term=0_899863399d-7712261cc2-39858325)

### *Evidence of lack of injuries or pain as consistent with sex not rape*

It is rare for a forensic medical examination to discover physical findings which are relevant to consent (or the lack of consent) – more usually any injuries are equivocal in this regard.<sup>51</sup> The summing-up in *Schuette* on the expert evidence of the examining doctor reflects the usual approach to genital injuries (emphasis added):

*Now I do need to discuss with you the evidence of Dr [ ]. In summary, she told you of three observed injuries on the complainant that you will need to think about. A laceration and an abrasion in her genital area and the abrasion on her left arm. The two vaginal injuries need to be considered very carefully. Dr [ ] acknowledged that such injuries can arise during both consensual and non-consensual activity so you should regard this evidence as neutral and not taking you anywhere at all.*

In this research a number of complainants gave evidence of bleeding or having pain or soreness after the alleged rape, and it was sometimes the physical effects that alerted the complainant to the offending afterwards or the following day:

- Q: *When you spoke with Detective [ ] you told us about how you went to the bathroom to the toilet and you talked about there being some blood, do you remember that?*
- A: *Yep.*
- Q: *Where was the blood coming from?*
- A: *My backside ...*
- Q: *There's just one more question I want to ask you about the blood, you mentioned it was coming from your backside, how did you know it was coming from your backside?*
- A: *Because that's – that's where the pain was and, I don't know. I don't know. (Kata)*
- ...
- Q: *Did you notice anything about your vagina after the incident?*
- A: *It was just very painful and there was bleeding that had occurred on the, on my underwear and on the sheets, on the sheet, bedsheets I think.*
- Q: *Did you have, were you menstruating or did you have your period at the time?*
- A: *No. (Lowrie)*

51 Iain McLean and others “Female genital injuries resulting from consensual and non-consensual vaginal intercourse” (2011) 204 *Forensic Science International* 27; and generally Julia Quilter “Rape Trials, Medical Texts and the Threat of Female Speech: The Perverse Female Rape Complainant” (2015) 19 *Law Text Culture* 231.

Claims of being sore following the alleged rape sometimes, however, formed the foundation of challenges to the complainant's credibility, on the basis that her subsequent sexual conduct with her partner was inconsistent with her claims that she was in pain in the days following (see the discussion in Chapter Five),<sup>52</sup> or that she was not as sore as now claiming, given the failure to seek medical care:

- Q: *And knowing that he didn't wear a condom must have really worried you about infection?*
- A: *Yes, it did.*
- Q: *Did you go to a doctor that night?*
- A: *No, I did not.*
- Q: *Did you go to a doctor the next day?*
- A: *No, I did not.*
- Q: *Did you go to a doctor that week?*
- A: *No, I did not.*
- Q: *That month?*
- A: *Not that I'm aware of, no.*
- Q: *I'm suggesting to you that the issue of you bleeding and being ripped, again that's just a reconstruction in your mind?*
- A: *No, it is not. (Harris)*

Lack of evidence of any physical injuries was, however, still asked about as relevant to the fact of consent, despite the absence (or presence) of any injuries having little or no probative value in such cases:

- Q: *You can't even remember the fact that [the defendant] was in your bed. You can't remember him – you can't remember resisting him for a start, can you?*
- A: *I don't remember him coming on to me, no.*
- Q: *You can't remember saying, "No"?*
- A: *No.*
- Q: *So, it really just comes down to whether you appeared to be in a fit state to consent to sex.*
- A: *I was not in a fit state, and I never consented to anything.*
- Q: *You don't have any memory for example of your legs being pulled apart?*
- A: *No.*
- Q: *Or of him being rough with you or anything like that?*
- A: *No.*

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52 At 175.

Q: *You don't have any injuries, marks, scratches?*

A: No. (*Tait*)

...

Q: *You had no injuries to the genital area, did you?*

A: *Only from it hurting to go to the bathroom.*

Q: *Only from the?*

A: *Only from it hurting to go to the bathroom.*

Q: *Would that be right, okay. You had sex for a long period of time with him, didn't you?*

A: *I didn't –*

Q: *On that night?*

A: *– I didn't have sex with him, he had sex with me. I had no interest in having sex with Heath. (*Walters*)*

...

Q: *Because at that stage Mr Patel had not threatened you with any type of violence or anything like that had he?*

A: No.

Q: *No threats. He hadn't manhandled you, anything like that?*

A: No.

Q: *Because at the end of the evening you didn't have any bruises, scratches or abrasions or anything like that did you?*

A: No. (*Patel*)

...

Q: *The penetration you described as thrusting it caused no injury did it?*

A: No.

Q: *It caused no pain?*

A: No.

Q: *You saw the doctor there?*

A: Yes.

Q: *And you were told by her, were you not, that there were no obvious tears or injuries associated with what you said had happened?*

A: *She said that there were no tears or injuries, not but –*

Q: *She couldn't see any tears or injuries?*

A: No.

Q: Yeah.

A: *She could not see any tears or injuries.* (*Carter*)

There is little judicial response in summing-up to the various inferences sought to be drawn from the presence or absence of injuries, although judges did refer to expert evidence offered on the point and in one case the judge did push back on a submission that a lack of injuries was relevant to the existence of consent:

*[The] expert opinion, unchallenged, was to the effect that the absence of damage means nothing and, of course, here we know that sexual intercourse in fact took place and you may well think that there was no evidence of it being violent, because rape is not violent sex, rape is sex without consent and without a reasonably based belief in consent. So, there is no inference to be drawn if you accept that evidence, and of course it's a matter for you to say: "Well there's no damage therefore she must have been consenting," that wouldn't be a proper approach I suggest to you.* (*Vandenberg*)

We consider that a similar type of statement should be included in directions in all cases, but especially when inferences about the absence of injuries are being invited, either through questioning or in closing arguments. Consistent with this approach, except in limited circumstances as consistent with medical evidence, should evidence of injuries be suggested to be consistent with an absence of consent? Evidence that the complainant experienced pain at the time or following the alleged rape, which may have woken her or alerted her to something that happened while asleep, will, however, usually be relevant and admissible evidence.

Other evidence offered by the prosecution or the defendant to establish consent included: whether or not she had a shower after the alleged offending; whether contraception was used or discussed; and whether the type of sexual behaviour that it is alleged the complainant consented to was "out of character". The admission of this type of evidence is discussed in Chapter Five.<sup>53</sup>

The fact of a "recent complaint", or early reporting of the alleged offending, was historically treated as relevant to the assessment of the complainant's credibility, but can also now be used to prove the elements of the charge (including lack of consent).<sup>54</sup> As evidence of a prompt or recent complaint is subject to a specific admissibility rule (section 35 of the Act), the offering of this evidence is also discussed in Chapter Six. Other challenges to the complainant's evidence about lack of consent – that is, suggestions that she had indeed

53 For the admissibility of evidence of the complainant's previous sexual experience with the defendant, as relevant to consent, see Chapter Five at 194.

54 That is, admissible to prove the truth of its contents: *Hart v R* [2009] NZSC 91, [2011] 1 NZLR 1 at [54]–[55].

consented were based on questions about her previous sexual activity with the defendant and that the sex was consensual at the time, but regretted (and lied about) later – usually due to the existence of an intimate partner. These types of challenges are also considered in Chapter Five. Challenges to memory gaps, as relevant to the complainant’s credibility and reliability, are discussed in Chapter Eight.

### ***Other aspects of jury directions about reluctant consent***

In four cases in the principal research and in one Pilot case the judge directed the jury that:

***Consent given reluctantly and later regretted, is nonetheless true consent. Not wanting the sexual connection is not the same thing as not consenting to it.***

We have some concern about this direction. In our view, someone saying that they do not want sex should be viewed as an expression of lack of consent and there is no supportable inference that sex can be both unwanted **and** consensual. This kind of terminology seems to rely on views about the availability of sex, especially from a partner, even when the sex is undesired. We are not sure what a jury is supposed to take from this use of “wanting”, when in other parts of the directions, the word is presented as analogous to, or consistent with, consent:

***[The defendant] said it is that aspect and what happened before and after which caused him to believe she was wanting him to have sex with her and was consenting.***

As previously stated, we also are of the view that “reluctant consent” is a contradiction in terms. If someone is unwilling to have sex, it cannot be said they have truly consented. In the following extract, the judge’s example in the Pilot case of *Lino* we believe reinforces the historical view that women will (or should) feel in some way obligated to have sex in some circumstances, even when preferring not to:

***So a full, voluntary, free and informed consent, but of course that consent can be reluctant, and not dealing with the facts of this case, but by way of analogy, a man and woman in a relationship, the man might be keen to have sex after being out at a restaurant, the woman may not be, but then she reluctantly consents. That is still a consent, even though it might have been reluctantly conceded, so long as it is full, voluntary, free and informed.***

The example was also not analogous, and rightly so, with the facts of *Lino*, which involved two young people who had never previously met. We query what a jury would make of this example, which we consider encourages a particular view of expectations and negotiations around intimacy and is unhelpful in a contemporary context when such mores are being (rightly) challenged and problematised.

Finally, in *Simon* the potential impact of intoxication on a complainant's ability to consent is also connected to the possibility of a later regretted consent, and further that a lack of memory due to intoxication does not mean a lack of consent, rather it is "a lack of memory":

*There is a really important distinction you need to appreciate around that issue of intoxication. The first thing is that generally speaking, if someone has been drinking and has agreed to sexual activity, but later regrets that decision, that does not mean to say there was no consent at the time. It might mean that they would not have engaged in the activity if sober, but that is not the same thing as being so intoxicated that they could not give an informed consent at the time, which is what the Crown are asserting in this case ...*

*The second thing, if someone has no memory as a result of being drunk at the time, of what was going on, that of itself again is not synonymous, does not equate with, not consenting at the time. That is a lack of memory and you need to bear that in mind.*

In our view, the second paragraph seems to prevent the jury drawing their own inferences as to whether a lack of memory may indicate lack of capacity to consent at the relevant time. Again, the statements made in this direction suggest that only significant intoxication ("so intoxicated") has relevance to whether there was free and fully informed consent. We consider that more helpful, consistent and accessible directions on how to use evidence of complainant intoxication as part of the decision-making process:<sup>55</sup>

*[T]he term [or concept] "capacity" remains problematic and when it is a central feature of the crime of rape which jurors are required to consider, further thought on how "capacity" should be defined and applied in cases involving voluntary intoxication is required.*

### **Evidence and questioning about the behaviour of the complainant with the defendant as relevant to consent**

In this part of the chapter we consider questions put or evidence offered about the complainant's behaviour towards the defendant around the time of the alleged offending. While this evidence is sometimes clearly stated as being viewed as relevant to consent, often the same evidence is relied on in closing arguments as providing reasonable grounds for the defendant to believe that the complainant was consenting. Consideration of the evidence of complainant behaviour, and the use to be made of it, is followed by consideration of judicial directions on the *mens rea* requirement of rape.

55 Clare Gunby, Anna Carline and Caryl Beynon "Alcohol-related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice" (2010) 74 The Journal of Criminal Law 579 at 598.



### Getting into bed with, or back into bed with, the defendant; inviting him into the bedroom

In cases in which the defendant has been invited into the complainant's bedroom, to share her bed, or she has got into bed with the defendant, juries are invited to draw an inference either that she was consenting to sex or that such circumstances would provide reasonable grounds to believe the complainant was consenting.

In *Buchner*, the defendant had gone home with the complainant (they had friends in common) after she had become upset one night. Her evidence was that she was happy for him to share a bed with her but did not want to have sex. In cross-examination she was asked about offering the defendant some more comfortable pants to wear to bed, and how she got undressed:

Q: *And so, what you then had on was your nightie and a pair of knickers?*

A: *Yes, and my bra.*

Q: *I put it to you that you didn't have your bra on?*

A: *No, I kept my bra on. I don't take that off when people are around.*

Q: *You wouldn't normally wear a bra on if you've got into your nightie, would you?*

A: *I kept it on.*

Q: *I put it to you that you didn't.*

A: *Well I kept my bra on because I wouldn't take it off in front of him.*

Q: *But you just said you'd turned away so he couldn't see?*

A: *But I wouldn't take a bra off anyway.*

Q: *So how did it come off?*

A: *My bra did not come off.*

In closing, defence counsel said:

*She invites Mr Buchner into her bed having changed into her nightie and telling him to take his jeans off. What message is that sending to him? What message is that sending to him? Is that what you normally do with your friends, take your pants off and jump into bed with me?*

In the Pilot case of *Lowrie* the complainant gave evidence that she had been put to bed by her friends at their house and was woken by the defendant. She said that at some point she went to the bathroom but has a hazy memory as to why – and the inconsistencies between the pre-trial statement and her evidence were put to her as meaning she was consenting at the time and now changed her story:

- Q: *Well I'm suggesting to you that you did brush your teeth and you brushed your teeth because you were preparing to kiss him when you went back [to bed]?*
- A: *As I said before I can't remember exactly brushing my teeth.*
- Q: *Okay. What did you say about your clothes in bed with Travis that first time. Did you say he took your underwear off?*
- A: *I said that I remembered my underwear being pulled down. I can't remember whether it was completely taken off or at what point it was completely taken off.*
- Q: *When you went into the bathroom had you put your underwear back on?*
- A: *I can't remember exactly ...*
- Q: *Well I suggest what you've done Ms Tucker is you've changed that today because you realise that **getting back into the bed with someone who has just digitally penetrated you, you say without consent, demonstrates your consent to what he just did** and it demonstrates your consent to what's going to happen. That's why you've changed that position isn't it?*

In re-examination the complainant was asked to explain why she did not leave or try to get help when she got up to go to the bathroom, and to respond to the defence theory of the case that this was regretted consensual sex:

- Q: *You were asked about the fact that you didn't call out for help or go and find your friends for help. Did you think about getting help when it was happening and when you were in the bathroom?*
- A: *No, I – the thought didn't cross my mind. I, yeah, I was still quite drunk and yeah, I felt very disassociated from the situation so I felt like I wasn't really in control of what was happening at all.*
- Q: *In essence what's being suggested is that this was a consensual episode and that you've just made up a story due to either embarrassment or encouragement from others. How do you feel about that suggestion that you've made it up?*
- A: *I think it's horrific given how much I've had to go through to get here and how many times I've been forced to relive what had happened to me and given the fact that I didn't speak at all throughout the event, I wasn't even asked for consent. I definitely didn't give any and again the fact that I was drunk and asleep prior to the event I wouldn't have been able to and I definitely did not want this to ever happen to me and to have my family and my friends have to go through this traumatic event as well, no I, I definitely – the accusation that I would have made this up is outrageous.*

In *Buchner*, the complainant was also questioned about why she got back into bed with the defendant after just making it clear that she did not want him to kiss her – the implication again being that she must have known what would happen (and therefore was consenting to the consequences):

- Q: *So you got out of bed, went to the toilet, knowing that he'd just kissed you and he'd given you a hug and then you got back into bed, right?*
- A: *Yes.*
- Q: *Why?*
- A: *Because I'd broken it off and I'd stopped it.*
- Q: *Broken what off?*
- A: *Broken him from kissing me.*
- Q: *All right but you get back in bed, what do you expect will happen? It's not the big red hand saying, "Get out of here," is it?*
- A: *Well he's a friend and I trusted him ...*
- Q: *Well what do you think – what sort of message do you think that gave to him by you getting back into bed?*
- A: *We were chatting, that's it.*
- Q: *Well you were chatting but then he'd kissed you and hugged you?*
- A: *And I stopped it by leaving.*
- Q: *And then started it up again by getting back in?*
- A: *I didn't go in to start anything.*
- Q: *No, that may be the case but he's lying in your bed, he's just kissed you, you've gone to the toilet and you get back into bed again. That's not exactly saying I don't want any of this, is it?*

In *Carter*, the complainant invited the defendant into her bedroom of her shared flat, as her flatmate and another friend were in the living area. She gave evidence that she had told the defendant she did not want to have sex with him, but was willing to kiss and hug him. In cross-examination she was asked whether her conduct (inviting him into her bedroom) would have led the defendant to believe she wanted to have sex with him:

- Q: *So are you saying that you were happy to have sexual conduct with him up to a point, but not intercourse. Is that correct?*
- A: *Yes.*
- Q: *You didn't make that clear did you, that you wanted to have sexual conduct but not to the point of intercourse?*
- A: *I don't think it's a very common thing to do, to sit in the car and say, "Do you want to come in and I will kiss you and I will hold your penis, but I'm not going to have sex with you."*

- Q: You wanted him to come in? You invited him.
- A: Yes. I wanted him to come inside, and I asked him, I said when he said “Do you want a quickie,” I said “No,” he could come in and chat and hang out. ...
- Q: Have you ever considered that your actions on that day could have been interpreted by [the defendant] as indicating that you were interested in sexual contact?
- A: I said no, more than once, and asked him to stop ...
- Q: But you meant yes by your actions to sexual contact because you were involved in it weren’t you?
- A: I did not want to have sex, and I said no, and I meant no. And he did it anyway.
- Q: That’s not answering my question. You did by your actions consent to sexual conduct with him.

Her willing participation, and invitation into her bedroom, was said, during closing arguments to be relevant to the defendant’s belief that she was consenting:

*When they got back, sitting in the car, chatting, she said, and the accused rather accepted this in the interview, she said, “He said, ‘Do you want to fit in a quickie before [you go out]?’” or words to that effect, to which she responded, “No, that’s not going to happen.” But then added, “I thought you might want to come in and have a chat and hang out inside”.*

*You might be wondering why that occurred. Why invite him in to do that, just to hang out and have a chat, when sex was clearly on his mind and, according to her, clearly not on her mind? Doesn’t really make sense, does it? If she really had no intention of getting involved in sexual conduct, why invite him in when he had made it clear, “How about a quickie?” And it rolled on from there, you may think.*

*Even more perplexing, why take him to the bedroom rather than hanging out in the living area of the house? ... If she truly didn’t want to engage in intimacy, why take a, to the bed, to the bedroom? There are no chairs there to sit on and have a nice chat and a cup of tea. There’s only a bed. She knew that.*

*He lay down on the bed first, according to her. What did she do? She didn’t sit on the other side of the bed by the suitcase. She lies down beside him. ... By taking Zachery into the bedroom, I suggest that was a significant signal to him that she was interested in sexual intimacy with him despite her saying that that wasn’t going to happen earlier.*

In evidence in chief the complainant said that she wanted to get away from the defendant once the sexual interaction went beyond what she wanted – but felt she had limited options by that point:

Q: *At that point, what was going through your head?*

A: *That I wanted to escape.*

Q: *Why didn't you?*

A: *But I thought I could, if I could break free from him, I'd have to jump off the far side of the bed and then get right back around to the door, and obviously he'd just have to stand up and he'd be at the door. Um, and even if I made it out the door, I had to go down the hallway and get through the, between the couches and the dining table and out the front door, and then if I got that far, what was I going to do? Run up the street half naked, screaming? I mean, if no one's out there, it's not really gonna do much because he can run after me and that would just, well, make him angry and ... I couldn't move. I was just scared.*

In *Masters* the questioning of the complainant in cross-examination included a focus on the meaning of her inviting the defendant around late at night to watch a movie in her bedroom:

Q: *And he came to your house at around about 11.30 pm, didn't he?*

A: *Yeah.*

Q: *And did you extend an invitation to him to come and watch a movie at your place?*

A: *I guess I allowed it.*

Q: *You agree with that? And the plan was to, he would come over to your place and watch a movie and hang out together I think is the, is the way it is described these days.*

A: *Yep.*

Q: *And so, he arrived at your place probably sometime around midnight?*

A: *It might have been earlier than that.*

Q: *All right, well we'll look at some of these texts later about that but, all right, so this is late at night. He arrives at your house. And as I understand what you are saying is that there was a short time after he arrived that you two went into your bedroom.*

A: *Yep.*

Q: *Was there any reason why you could not, did you have a lounge at your address?*

A: *Yes, but it was already being used.*

Q: *What were they doing out there?*

A: *Just hanging out, studying.*

Q: *In the lounge?*

A: *Yes.*

Q: And so, you took him to your bedroom?

A: Yes.

Q: And you led the way there?

A: Yeah.

Q: And when you got into your bedroom did you shut the door?

A: I don't know.

Q: And you both, well did you suggest that he should hop up on your bed?

A: Yeah, we were both on top of the covers. We were just gonna watch a movie, as friends.

Q: Right. As you do, yes. And so, you sat on the bed side by side?

A: Yes.

In the same case, the complainant gave evidence that sharing a bed with the defendant was on the basis that it was “strictly spooning” – but which she meant cuddling but nothing sexual. During cross-examination it was put to her that it “is pretty obvious” what will happen in this kind of scenario:

Q: We have been referred to these text messages where you talk about [the defendant] coming over and **strictly spooning** and that sort of thing. Right? You were happy weren't you at the idea that he could stay in your bed overnight but on a **strictly spooning** basis?

A: Yeah –

Q: Right?

A: N – nothing was expected from me –

Q: Yes –

A: Sexually.

Q: So, I just want to now try and make it clear to everybody what we are, what you are saying when you talk about the spoon. It is okay presumably for you to lie hard up close to each other with your bodies touching in this spooning context isn't it?

A: Um, it doesn't always have to be pressed up right against, hard against each other no ...

Q: But that is pretty obvious that that is what is going to happen at some stage during the night isn't it?

A: Um, not really that obvious ...

Q: – Well he is in your bed. And you are in there too –

A: Yeah but that's completely different –

Q: – and spooning is the topic and that means doesn't it lying, touching each other, one behind the other?

- A: Yeah.
- Q: That is what spooning is.
- A: Yep ...
- Q: [T]his spooning, wouldn't you expect that there'd be some touching of the other intimate part of the other person's body even by accident?
- A: Um, maybe but I kept saying no I didn't want that to happen.
- Q: So, you were okay with him lying behind you with his arm over his body but you just didn't want him to touch you anywhere intimate, is that what you're saying?
- A: Well yeah there's a big difference between cuddling and that.
- Q: Sorry?
- A: Yes.
- Q: So, you agree with me, right?
- A: Yeah.
- Q: Well what would happen if in the night, you know, one of you moved and his hand went onto your breast or something, would that be alright, in this strictly spooning context?
- A: No because it's different when it's grabbing and on purpose when you've said no ...
- Q: And if he's naked you could, you know, touch his penis, couldn't you?
- A: Yeah.
- Q: Did it cross your mind that there could be an element of possible sexual arousal in this spooning thing? Is that something you thought about?
- A: Um, no because I thought I made it – I made it quite clear it's not to be involved.

Despite the complainant being clear about what she wanted (the parameters of the sleeping arrangement – and the defendant repeated the words “strictly spooning” in his text messages to her), it was put to her that this kind of behaviour was more like an invitation to have sex – “it's pretty obvious what will happen”. This interpretation of her interaction with the defendant was developed in closing argument:

*The defence says to you that ... he was in her bed with her full knowledge and her consent. In the circumstances of a developing relationship and in the context of their spooning there was an implied consent to touch, to the touching of each other's body which the defence says just happened in a natural way.*

*So, there she is, with him in her bed for the night ... And we know that when the movie was finished, they would lie together in the bed and their bodies would be touching because that's what spooning is all about in the real world. In the real world.*

The Crown, in closing, tried to disrupt this narrative about consent being implied from the surrounding circumstances:

*In the twenty-first century, wearing leopard skin pyjama pants and a pink t-shirt to bed doesn't amount to consent to sexual activity. In the twenty-first century, having someone to stay over at your house after 10 pm to watch some videos on a laptop, even on your bed, doesn't amount to consent to sexual activity. In the twenty-first century, agreeing to have someone sleep in your bed for spooning doesn't amount to consent to sexual activity. In the twenty-first century, getting into your own bed, fully-clothed, to sleep next to a person who's already asleep, doesn't amount to consent to sexual activity.*

In summing up, the judge did not refer to the different inferences that could be drawn from the complainant's behaviour but did refer to the defendant's understanding of what he was meaning when suggesting he come over and stay the night, "strictly spooning":

*He submitted to you that you needed to look at the spooning reference in context. He submitted to you that it was really a cheeky, spicy, suggestive kind of text message between the two, but not of the restrictive kind that the Crown had suggested.*

During cross-examination it was put to the complainant in *Walters* that the particular kinds of sexual positions that formed part of the alleged rape would not have been possible unless she was consenting, and that she was also able to leave, but did not:

Q: *And then you had some quite complicated sex in the lounge, didn't you, on the sofas?*

A: *Um ...*

Q: *Difficult positions?*

A: *I guess.*

Q: *Requires co-operation, I suggest to you –*

A: *No.*

Q: *– to get into the positions you're talking about?*

A: *Well, he was the one – he was controlling everything.*

Q: *And he offered you some food –*

A: *No.*

Q: *– after the alleged rape, didn't he?*

A: *No. He didn't offer me any food, and it was, it was rape.*

Q: *He charged your phone for you, didn't he?*

A: *I charged my phone on his charger, yes.*



- Q: You were free to leave at any time, weren't you?
- A: No, he wouldn't let me leave.
- Q: He didn't stop you leaving at any time, did he?
- A: He wouldn't let me leave. If I wanted to leave, he wouldn't have let me, and if I said I wanted to leave he would say, "No, you can't go".

### Evidence of the defendant apologising as relevant to belief in consent

In four cases of the 40, the Crown offered evidence of the defendant apologising for his behaviour shortly after the alleged rape, but the apologies were seemingly not all viewed by the jury as amounting to admissions, as in only one case was the defendant convicted:<sup>56</sup>

- Q: Now, you've just been given a document that's entitled "text message schedule" and if I get you to turn to [page], we can see there this is a typed out copy of the text, a text that's been sent to you [three days after the alleged rape]. Sender is Jordayne Sarkisian [the defendant], you're the receiver, and if you could just read out for us what that text message was.
- A: "Katrina, it's Jordayne. All I can say is I'm truly sorry. I'm sorry for what has been done and the lives that I have ruined. I'm searching within myself for the answers why and I don't know how that happened. Last thing I remember is being at the table. Katrina, I don't know, I don't know, I really don't know. Katrina, I hate that this has happened and I hate it. I didn't want this to happen. It is the most disgusting thing. I don't know why it happened and I have no answers for you ... I can't find the answer and I want it but I love you Katrina, I really do and please don't put your dreams on hold. You are amazing people." (*Sarkisian*)

...

- A: That is the message that he sent me later in that night.
- Q: And can you just tell us, is that the Facebook message?
- A: Yes, that's the screenshot of it.
- Q: And have you captured the screenshot –
- A: Yes, I have.
- Q: – and printed it out?
- A: Yep.
- Q: Okay, what does it say?

<sup>56</sup> *Waititi*. In *Young* the complainant gave evidence that the defendant acknowledged: "I literally just raped you". He was convicted (after a re-trial) and sentenced to seven years imprisonment.

A: *It says, “Heya dude I just wanna say I’m so fuckin sorry for last night. I was way, way, way out of line and acted like a fuckin douche bag. There’s nothing I can do to correct what I did, it was fuckin disgusting and I’m 100% ashamed of myself. I can understand if you don’t wanna talk to me and there really is no way to say how sorry I am. If you feel like – if you feel as if we can talk text me, I’m logging off Facebook”.* (Buchner)

...

Q: *The next text, can you read that one out for us?*

A: *“I’m real sorry. I was way too forceful and feel awful now.”*

Q: *And we see that that is sent at [after 4 pm]. What time was your [sport] class?*

A: *It started at five.*

Q: *And then, there’s no reply from you, is that right?*

A: *Yeah.*

Q: *And what’s the next text you receive from him?*

A: *Him asking me if I was okay.*

Q: *And that’s at ten past eight at night?* (Carter)

...

Q: *And so you were pushing his chest. What happened next?*

A: *So at some point he got off me or I managed to push him off and then he was on the ground sort of sitting up against my wardrobe mirror.*

Q: *And from there?*

A: *He was quite upset at the time. Was, just kept saying that he was sorry. Yeah, was visibly quite upset. I was quite angry at this point so I got up and put some pants or some shorts on and opened my door, told him to get out.* (Waititi)

In one of the Pilot cases, the complainant gave evidence of the defendant, through a mutual contact, offering her money not to go to the police.

Q: *The next part I want to ask you about is if you don’t go to the police, what was going to happen?*

A: *So, Mona told me, if I go – sorry if I don’t go to the police, that [the defendant] may give me some money, he has family, he has business and it’s not gonna, damage his reputation and we are all happy.*

Q: *Did she say how much money?*

A: *She didn’t tell the amount of the money.* (Junn)

### *Lack of reasonable grounds for belief in consent: directions*

In *R v Gutuama* the Court of Appeal noted that jury directions on reasonable belief in consent (the third element of sexual violation) were frequently “barely adequate or positively wrong”,<sup>57</sup> noting that proving a negative is always difficult and considered that the frequent errors in direction might be because there are two independent ways that the onus of proof can be discharged. The Court outlined a preferred approach to the direction to the jury:

*Remember that as with all aspects of the charge of sexual violation, the Crown has the onus of proving the third element. The Crown must prove that the accused did not have any reasonable belief in consent. It is not for the accused to show that he did have such a belief.*

*There are two ways in which the Crown could satisfy you on that subject. Either would do.*

*One would be to satisfy you that the accused did not in fact believe that she was consenting. That is concerned with what the accused himself thought at the time. If he himself did not believe she was consenting, that would be enough from the Crown’s point of view.*

*The other way of satisfying the third element would be to satisfy you that no reasonable person in the accused’s shoes could have thought that she was consenting. That is concerned with the belief of a reasonable person placed in the accused’s position. If no reasonable person would have thought that she was consenting, that too would be enough from the Crown’s point of view.*

*On the third element of sexual violation the onus is on the Crown to satisfy one or the other of those requirements. It must satisfy you beyond reasonable doubt.*

*If the Crown has failed to prove that the accused did not believe on reasonable grounds that she was consenting, the third element of sexual violation would not be satisfied. In that case you would find him not guilty.*

This approach has since been cited with approval in a number of other appellate decisions.<sup>58</sup> In *Taniwha v R* the Supreme Court refused leave to appeal a decision based on the standard *Gutuama* direction given at trial.<sup>59</sup> The appellant argued that the *Gutuama* direction departs impermissibly from the wording of section 128 of the Crimes Act 1961, as it fails to take into account consideration of the reasonable grounds based on the facts as the defendant believed them to be. The Supreme Court refused leave on the basis that the issue was moot,

<sup>57</sup> *R v Gutuama* CA275/01, 13 December 2001 at [39].

<sup>58</sup> For example, *Tutu v R* [2011] NZCA 527; *T (CA3/2016) v R* [2017] NZCA 626.

<sup>59</sup> *Taniwha v R* [2010] NZSC 50.

as there was nothing suggested about the circumstances, or concerning the characteristics of the appellant himself, which the jury might have omitted to take into account as a result of being directed as they were.<sup>60</sup> In *Nixon v R* the Court of Appeal noted that a *Gutuama* direction does not necessarily exclude a consideration of any of a defendant's personal characteristics in the rare case where there is a credible narrative or expert opinion.<sup>61</sup>

In *Warmenhoven v R* the Court of Appeal endorsed the *Gutuama* direction and noted it was a "clear and succinct explanation of an arguably awkward concept".<sup>62</sup> However, the Court noted that the direction was framed before it became common for judges to use written materials, such as issues sheets, question trails or written directions. The Court considered that the *Gutuama* direction could be easily adapted into question form for use in written materials, in a manner consistent with the judicial emphasis on the prosecution's burden of proof beyond reasonable doubt, suggesting that the question and explanatory directions read:<sup>63</sup>

*Are you sure that at the time sexual intercourse occurred **no reasonable person** in Mr Warmenhoven's position could have believed that M was consenting?*

- (a) If the answer is yes, you must find the accused guilty.*
- (b) If the answer is no, you must find the accused not guilty.*

#### **"No reasonable person"**

The majority of directions in the principal research on this aspect of section 128 followed the directions set out in *Gutuama*, and in the question trails – for example:

*The second way of satisfying you would be for the Crown to satisfy you that **no reasonable person** in the defendant's shoes could have thought that the complainant, Ms DeSouza, was consenting. That is concerned with the belief of a reasonable person placed in the defendant's position at the time. If **no reasonable person** would have thought that she was consenting, that too would be enough from the Crown's point of view. Again, in relation to question 2, you need to look at whether the defendant had a belief on reasonable grounds at the time the sexual act happened. So, the Crown case is that he did not believe on reasonable grounds that Ms DeSouza was consenting. The defence case is that he did believe on reasonable grounds that she was consenting. If your answer is, "No," you are not sure, then you would find him not guilty and go to the next charge. If your answer is, "Yes," you are sure, then you would find him guilty and go to the next question. (*Perez*, summing-up)*

...

<sup>60</sup> *Taniwha v R* [2010] NZSC 50 at [3].

<sup>61</sup> *Nixon v R* [2016] NZCA 589 at [30].

<sup>62</sup> *Warmenhoven v R* [2011] NZCA 391 at [23].

<sup>63</sup> At [23]–[25].

*Are you sure that he had no reasonable grounds to believe she was consenting?*

*If “NO” (i.e. it is reasonably possible a reasonable person in his position would believe she was consenting) find him NOT GUILTY on charge 1 [rape].*

*If “YES” (i.e. you are sure **no reasonable person** in his position would believe she was consenting) find him GUILTY on charge 1 [rape]. (Walters, question trail)*

However, there is no reference in these recommended directions to the requirement that the standard of the reasonable person should be a **sober** person, and, in our view, the direction departs from the wording in the Act – especially the requirement that the jury must be sure that “**no** reasonable person” would believe the complainant was consenting.<sup>64</sup> In our opinion, the requirement that **no** reasonable person would have had that belief, appears more demanding to satisfy than asking whether **a** (or **the**) reasonable person would not have believed she was consenting. The wording implies that there is a range of beliefs held by different reasonable people and that jury must be sure that **no-one** in this group of reasonable people would have believed that the complainant was consenting. The actual inquiry in section 128, however, is what a reasonable person, or “the” hypothetical reasonable person would have believed. Given that the amendment to section 128 was enacted to specifically add a negligence standard (he ought to have known she was not consenting), we question the form of words currently recommended for inclusion in a jury direction. We prefer (with the addition of the reference to a sober person), the directions given in the majority of the Pilot cases:

*At step 3 you ask yourselves the question, are you sure that Jeremy Cropp did not believe on reasonable grounds that Paige Downley was consenting to the sexual penetration? Beneath is the note “reasonable grounds.” You need to consider whether a reasonable person in the defendant’s shoes would think the complainant was consenting. That is concerned with the belief of a reasonable person placed in the defendant’s position, so you need to ask yourself, did Jeremy Cropp believe Paige Downley was consenting. In other words, what did he think? What was in his mind? You then need to ask yourself, was it reasonable for him to believe that she was consenting? In other words, what would a reasonable person have thought in those same circumstances? If the answer to the question in step 3 is no, you find him not guilty of charge 2. If yes, you find him guilty of charge 2. (Cropp, summing-up)*

64 Or that the defendant had “no reasonable grounds” – see for example the question trial in Lino: “Has the Crown proved, beyond reasonable doubt, that there were no reasonable grounds (viewed from your perspective) for [the defendant] to believe [the complainant] was consenting to the sexual intercourse?”

The steps in the inquiry were also included in a number of the Pilot question trails, and we prefer the versions of these types of explanations, as reflecting the terminology of section 128 while still being accessible and of assistance to the jury:

*Are you sure that at the time of penetration Mr Lowrie did not have reasonable grounds to believe that Ms Tucker was consenting?*

*“Reasonable grounds to believe” is an objective test so it requires you to consider what a sober reasonable person, in Mr Lowrie’s position, would have believed.*

*If yes, find Mr Lowrie “guilty”.*

*If no, find Mr Lowrie “not guilty.” (Lowrie, question trail)*

...

*“Reasonable grounds”. You need to consider whether a reasonable person in the defendant’s shoes would think the complainant was consenting. That is concerned with the belief of a reasonable person placed in the defendant’s position.*

*(Redman, question trail)*

However, the recently publicly available question trail includes the following question for the jury to answer:<sup>65</sup>

*Has the Crown made you sure that at the time Mr Smith penetrated the genitalia of Ms Jones with his penis, **no reasonable person** in Mr Smith’s position could have believed that Ms Jones was consenting?*

*If no, find Mr Smith not guilty.*

*If yes, find Mr Smith guilty.*

### Reasonable grounds for believing an intoxicated complainant is consenting

The relevance and use of evidence of complainant intoxication on consent and reasonable grounds to believe in consent have been discussed at various points in this chapter.<sup>66</sup> Here, we consider the content of jury directions given by judges as to how a defendant’s evidence that she was a willing (but drunk) sexual partner may be used to determine whether he had reasonable grounds to believe she was consenting. See for example:

*It’s a matter for you whether you think she could have been an apparently co-operative partner and yet be unaware of it given her drunken state. If that is a reasonable possibility, members of the jury, then the accused plainly would have reasonable grounds for belief and consent and should be acquitted. (Tait)*

<sup>65</sup> <https://www.courtsofnz.govt.nz/for-lawyers/question-trails/sexual-violation-by-rape-section-128-crimes-act-1961>

<sup>66</sup> At 257 and 298. See also Chapter Eight at 339 and Chapter Nine at 440.

We are concerned about the use of such a direction if it can be taken to mean that even though a woman did not have capacity to consent (due to how affected she was by alcohol), if there is a “reasonable possibility” that she could have been acting purposively, according to the evidence of the defendant, that will provide the defendant with reasonable grounds to believe that she was consenting. Given that such behaviour will always be a “reasonable possibility”, in the absence, presumably, of evidence that the complainant has never behaved in this way while severely intoxicated, or no-one behaves in this way, or there were witnesses, this type of direction seems to lead to only one result. We consider that what is (or should be) at issue in such circumstances is what the defendant knew about how intoxicated she was at the time, regardless of how she behaved once he got into bed with her – that is, what should a reasonable person have thought about her **capacity** to consent.<sup>67</sup>

This, we acknowledge, is a somewhat different inquiry from whether the defendant had reasonable grounds to believe she was consenting – but in our view, is consistent with the policy underpinning the reforms to both sections 128 and 128A. An amendment may be required – perhaps to the effect of that suggested in the *Gillen Review*.<sup>68</sup> Where certain circumstances (in a version of section 128A) exist (“where C is overcome by the effects of alcohol or drugs”), then the complainant does not consent **and** “if the defendant was aware of these circumstances, the defendant did not reasonably believe that the complainant was consenting”. That is, giving more effect to the content of section 128A when directing on the elements of section 128.

Elizabeth Sheehy discusses this issue and what should be the requisite inquiry in the following way:<sup>69</sup>

*What are reasonable steps to ascertain consent when women are asleep or unconscious for any reason? The answer seems simple: at the very least the law must require men to ensure that their partners are conscious before proceeding. Reasonable steps might require that the accused wait some period of time to ensure that the woman is truly awake and giving her unequivocal agreement, rather than embarking on sexual contact while the woman is still prone in her bed, hazy and half conscious.*

67 Liz Walls and Antonia Quadara *Under the influence? Considering the role of alcohol and sexual assault in social contexts* (Australian Centre for the Study of Sexual Assault, Issue No 18, 2014) <https://aifs.gov.au/publications/under-influence>

68 *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1* (Department of Justice, 2019) at 17: “[W]here any of these circumstances exist, the complainant does not consent to any sexual act, and if the defendant was aware of these circumstances, the defendant did not reasonably believe that C was consenting”.

69 Elizabeth A Sheehy “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Elizabeth A Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press, 2012) 483 at 523.

*To proceed without ascertaining that the woman knows who the accused is and what his intentions are – when the most an accused can say is that the sleeping woman moved her body or murmured something in her sleep – is surely predatory conduct that the criminal law should forbid. If a woman is intoxicated by alcohol and or drugs, then further steps must include waiting until the next day when she will have recovered from her incapacity.*

### **Reasonable grounds for believing that the complainant consented when section 128A circumstances exist**

While the circumstance of the cases in this research have required us to focus on subsections 128A(3) and (4), one of the cases involved a complainant initially mistakenly thinking that it was her boyfriend who had got into bed with her. Section 128A(6) provides that a “person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is”. While initially permitting the defendant to continue because she was under that misconception cannot be a valid consent, the jury were directed that her mistake (and her consequential behaviour) would provide a reasonable basis for the defendant to believe she was consenting:

*Under the influence of the drink and drugs that she has had, she may have believed that she was in bed with her boyfriend, and when she felt this person behind her she behaved in a manner that accorded with that belief by co-operating in a sexual encounter with the person behind her believing that it was her boyfriend.*

*Well, if she believed that, that does not mean she is consenting to having sex with this accused because her consent would be limited to the person that she believed she was with. **But if she believed that and was behaving in a manner which caused the accused to believe that she was up for sex with him, that would certainly provide a reasonable ground for him to believe that she was consenting, whether she was in fact consenting or not.** If, under the mistaken belief that she was with her boyfriend she said things and did things that she would not have done if she had known who was behind her but nevertheless could be interpreted by that person as being signs of willingness, then the accused would have reasonable grounds for a belief in consent.*

The verdicts in this case, an acquittal on the rape charge (the first sexual interaction which she initially thought was her boyfriend) but a conviction for unlawful sexual connection (anal penetration), indicate the jury accepted she behaved in a manner consistent with consenting at the time she believed it was her boyfriend. On appeal (including on the grounds of inconsistent verdicts), the Court of Appeal expressed no concern with this part of the judge’s directions. In our view, however, the ability to argue that the defendant had reasonable grounds to believe that consent had been given in circumstances that the legislation provides consent cannot be present, is problematic. In the mistake context, for example,



once the defendant is aware that a complainant has mistaken him for someone else, there surely can be no reasonable grounds for believing she is consenting. When a complainant makes a mistake as to identity due to intoxication (intoxication the defendant is aware of), then this type of direction seems to deprive section 128A of its intended role.

As with regards to intoxication (section 128A(4)) and lack of resistance (section 128A(1)), we consider that whether a defence based on reasonable grounds is available, when the circumstances in section 128A are argued to exist, requires further legislative or appellate attention. While the Supreme Court in *Christian* held that “relationship expectations” may provide a context in which a defendant may believe on reasonable grounds that a passive or “frozen” complainant might be consenting, there is little case law on the interpretation and application of section 128A in the context of adult rape cases. While appellate case law exists to the effect that “if a complainant is unconscious or asleep, there cannot be a reasonable belief in consent”,<sup>70</sup> there is one High Court case in which the defendant’s acquittal was upheld, even when he knew the complainant was unconscious, given their previous discussions about when he would be permitted to continue in such circumstances.<sup>71</sup> This case also indicates the need for clarity regarding the role of section 128A about the existence of “reasonable grounds”.<sup>72</sup> In *Christian*, Elias CJ was of the view that the policy behind section 128A is not undermined by allowing a defendant to argue that, despite the complainant’s lack of protest, he nevertheless had reasonable grounds to believe the complainant was consenting.<sup>73</sup>

[105] Section 128A is concerned with consent, not with reasonable belief in consent. It makes impermissible reasoning that absence of protest amounts to consent because such reasoning flies in the face of experience about power imbalance and the ways in which complainants may be deprived of choice. Section 128A does not suggest that lack of objection or resistance is not relevant to reasonable belief in consent or indeed that it is not relevant to the question of consent in context. It provides that a person does not consent “just because” no objection or physical resistance is made. Whether the defendant reasonably believes in consent remains a question of fact on the evidence as a whole. There will always be a wider context in which absence of protest or resistance must be considered when assessing the fact of consent and the fact of reasonable belief in consent. Although the policy behind section 128A

70 *Nixon v R* [2016] NZCA 589 at [31], citing *Pakau v R* [2011] NZCA 180 at [30].

71 *R v S* [2015] NZHC 801.

72 See the critical examination, and re-imagining, of this decision by Paulette Benton-Greig in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino, A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) at 425–455.

73 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315. Citations omitted.

may itself be relevant to reasonableness of belief, it is not determinative as a matter of law. A reasonable belief in consent may exist even though section 128A makes it clear that the complainant's actual consent is not given "just because" of failure to protest or resist. Whether the defendant has a reasonable belief that the complainant consents turns on what he believes and whether it is reasonable in context (in which the policy of choice behind section 128A may well be relevant). It does not depend on the meaning of consent.

[106] I acknowledge that on the approach of the majority in this Court the assessment of the reasonableness of the belief in consent is contextual and that the difference between us may not be significant in application. But search for "something more" distracts from the inquiry as to the defendant's belief and may be misleading, as the Court of Appeal decision in the present case illustrates. *Just as the policy of section 128A is not undermined if there is no "positive" expression of consent (as the Court of Appeal thought it was), it is not undermined because the jury must still exclude reasonable belief in consent by the defendant on all the available evidence.*

If this analysis is correct, then it remains even more pressing for the jury to be given guidance on what is reasonable in the particular context. If this does not occur, it may be up to Parliament to further clarify the intended impact of section 128A on the existence of "reasonable grounds".

### ***Introduction of statutory definition of consent and reasonable grounds***

We note that consideration of the definition of consent for the purposes of the offences of sexual violence is on the longer-term work plan of the current Government.<sup>74</sup> The New South Wales Law Commission is currently completing a reference dealing with the definition of consent, which will provide an excellent resource for future local work.<sup>75</sup> For now, we record our agreement with Sarah Croskery-Hewitt that an affirmative definition of consent is an overdue and desirable measure in addressing sexual violence.<sup>76</sup>

74 *Proactive Release – Improving the justice response to victims of sexual violence* at [81] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>

75 See the draft proposals (October 2019) <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Draft-proposals/Draft%20proposals.pdf>

76 Sarah Croskery-Hewitt "Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex" (2015) 26 NZULR 614 at 641. Another excellent locally-drafted contribution to the debate about the value of a communicative model of consent (and the limitations of law reform in this area more generally) is by Jesse Wall: "Justifying and Excusing Sex" (2019) 13 Criminal Law and Philosophy 283.

*The issues raised by intoxicated consent to sex are symptomatic of the failings of our current model of consent to construct female sexuality in an active, autonomous manner. An affirmative, communicative model of consent is the best means of remedying this and could pave the way towards a more equal, positive conception of sex, not only improving conviction rates for sexual offences, but influencing how society views and undertakes sexual relationships more broadly. While it is true that the most important conditions for sexual equality “lie in cultural attitudes rather than coercive legal rules”, the adoption of an affirmative, communicative model would be a powerful signal of the law (and society’s) changed understandings of gender norms. This in turn could encourage the necessary shift in cultural attitudes towards acceptable sexual behaviour.*

In 2009, *Te Ohaakii o Hine – National Network for Ending Sexual Violence Together* (TOAH-NNEST) reported strong support (52 out of 61 submitters) for including statutory guidance in the Crimes Act 1961 as to what should be considered in determining whether or not a reasonable belief “was formed by the defendant”.<sup>77</sup> The preferred option was to amend the law to require that, “when determining whether the accused had reasonable grounds to believe that complainant consented to sexual activity, the court must have regard to all the circumstances relevant to the case **including any steps the accused may have taken to ascertain whether the complainant was consenting**”. Such a reform was recommended in the 2019 *Gillen Review*,<sup>78</sup> and this terminology is already used in the Sexual Offences Act 2006 (E & W). Such legislative language has, however, also been criticised, as even this type of reference to “all the relevant circumstances” permits, if not encourages, “a jury to take into account stereotypical and sexist views regarding appropriate female behaviour when determining whether a defendant’s belief was reasonable.”<sup>79</sup> Further, the use of a reasonable person standard of itself has been subjected to feminist critique over many decades – and, as a consequence, Sharon Cowan suggests that direction on what is reasonable needs to be provided.<sup>80</sup> Simon Bronitt and Patricia Easteal also call for further judicial guidance:<sup>81</sup>

77 *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence Incorporating the Views of Te Ohaakii o Hine – National Network for Ending Sexual Violence Together* (Ministry of Justice, Wellington, 2009) at Appendix T.

78 *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1* (Department of Justice, 2019) at 20.

79 Anna Carline and Patricia Easteal *Shades of Grey Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge, London, 2014) at 168.

80 “The problems [identified by feminists] of using a reasonable standard are not addressed by leaving the vague phrases ‘reasonable in all the circumstances’ to the jury and hoping for the best. Clearer direction on what is reasonable, or even what is unreasonable, perhaps by enacting a list of examples might be preferable”: Sharon Cowan “‘Freedom and capacity to make a choice’: A feminist analysis of consent in the criminal law of rape” in Vanessa E Munro and Carl Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, New York, 2007) 51 at 66.

81 *Rape Law in Context: Scales of Injustice* (Federation Press, Leichhardt, NSW, 2018) at 11.

*[R]easonableness requires careful judicial elaboration, tailored to the facts of the case and supported by expert evidence, to prevent the jury reflecting and condoning dangerous rape myths. Despite decades of law reform tinkering with key definitions and jury directions, how reasonableness standards, which are firmly embedded within legal and non-legal cultural contexts, are operationalised at trial – either to condone or contest rape myths and stereotypes – will be determinative of guilt.*

### **Summary: consent, capacity, intoxication and juror capabilities**

Our analysis of the approach taken in questioning to the issue of consent indicates that, in both studies, rape mythology concerning matters viewed as relevant to consent (clothing, failure to resist or make an immediate “hue and cry”) was relied on as the basis of suggesting the complainant was consenting. However, there were fewer examples of this kind of reliance in the Pilot cases than in the principal research. Some of this difference may be explained by the fact that the Pilot cases were very homogeneous (all involved the alleged rape of a heavily intoxicated woman). We therefore consider that the proposed counter-intuitive directions should include reference to:<sup>82</sup>

- (1) the extent to which people who are sexual assaulted are unable to, or do not, physically resist the attack, due to the physiological and psychological impacts of the event;
- (2) the fact that in the majority of cases no genital injuries occur; and
- (3) the fact that what victims were wearing at the time of the offending is not a contributor to sexual violence.

The impact of complainant intoxication (primarily due to alcohol, sometimes in combination with drugs) on the content and scope of questioning and the jury directions was significant. Evidence of intoxication may impact on capacity to consent, as well as on the reliability and accuracy of a complainant’s recall of the events – but decisions about the extent to which intoxication has either of those effects are for the jury, with little assistance from the judge, and rarely from expert opinion. This is an area where it has historically been left up to the jury to determine the effects of complainant intoxication on the matters at issue, based on their own knowledge of the impact of alcohol. While in some cases, witnesses were able to provide other evidence about how much the complainant had drunk, often the complainant was asked to self-report on how many drinks she had, or what size and alcohol content, and also to indicate how drunk she was on a scale of 1 to 10. It is unclear what assistance the jury gains from this information.

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82 See further Recommendation 36 in Chapter Ten.

While section 128A(4) of the Crimes Act 1961 provides that a person may be “so affected” by drugs or alcohol so that she cannot consent, even when, in both groups of cases, the complainant reported being “totally out of it”, the defendant was acquitted. That is, in situations where the facts indicate a lack of capacity to consent **and** subsequently absence of reasonable grounds to believe such a person was consenting, no crime of rape was established. We consider this is a matter worthy of attention, given the policy behind section 128A(4), and the other elements of that section. Jury directions regarding the impact of intoxication on consent should, we believe, refer to the content of section 128A(4) as well as to the need for the jury to form a view of the complainant’s ability to give consent at the relevant time, not just the impact of intoxication on inhibitions. That is, the focus should clearly remain on: “What is essential for valid consent is that the complainant had an understanding of her situation and was capable of making up her own mind”. Consideration should also be given as to whether further guidance should be given to the jury as to when intoxication may have an impact on a complainant’s **capacity** to give free and informed consent, whether by jury directions or expert evidence.

A number of other observations can be made regarding the content of jury directions, and question trails, in these cases. There was no clear uniform approach to directing the jury on the meaning of consent, or on how to apply any relevant provisions of section 128A of the Crimes Act 1961. While there were good models, in our view, in some of the directions in the Pilot cases, they were not used in all cases, even though they were very similar fact patterns. In particular, there was no reference to section 128A(3) in a number of cases in which the evidence was that the complainant had gone to sleep, after becoming intoxicated. We also consider that jury directions should not include the phrase: “Not wanting the sexual connection is not the same thing as not consenting to it”. We also disagree with the existence and use of a direction that “consent given reluctantly” is still consent. We view a clear expression of reluctance as unwillingness, followed by coercion rather than “free” consent. Given the ongoing inquiries during the trial, and the content of closing submissions, we consider that jury directions should make it clear that the use of force or the threat of force by the defendant is not an element of the offence of sexual violation.

Related to the development, and adoption, of uniform directions as to the elements of section 128, we support the Government’s proposal, as part of the long-term work plan, to consider the desirability of the codification of the definition of a consent (including a requirement of an “affirmative communicative model”). Such a work programme should include consideration of whether the requirement of lack of consent be replaced with another inquiry.

Another issue arising out of this analysis is the impact of the matters listed in sections 128A (1)–(7) of the Crimes Act 1961 on the *mens rea* requirement in section 128. We consider that legislative guidance must be provided regarding in which circumstances, if a defendant is aware of the existence of any of the matters listed, should that preclude an argument that the defendant believed on reasonable grounds that the complainant was consenting.<sup>83</sup> Currently we are of the view that the reforms introduced in 2005 have not resulted in effective change – that is, the protection of vulnerable women. Related to this point is the desirability of public consultation, given the current level of debate,<sup>84</sup> as to whether legislative guidance or jury directions should contain examples of what should or should not amount to reasonable grounds (to believe the complainant was consenting).

Regardless of any future legislative change, or appellate guidance, there are two further recommendations that arise out of our analysis of the jury directions on the *mens rea* of rape. We believe that, consistent with the law, jury directions and question trails should provide that the standard of the reasonable person is that of a reasonable **sober** person, in the position of the defendant (that is, in the absence of exceptional cases, the defendant’s personal characteristics, such as his level of intoxication, are irrelevant to the objective assessment). This aspect of the inquiry is not present in all directions. Further, we are of the view that jury directions and question trails regarding the current *mens rea* of section 128(2)(b) should avoid reference to a requirement that “**no** reasonable person” would have believed the complainant was consenting – rather, the reference should be to “**the**” or “**a**” reasonable person’s belief, as an objective test.

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83 Part of this work will require examination of aspects of the Supreme Court’s decision in *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315, see above at 248 and 282.

84 <https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/6dhd38-Criminal-Justice-Victims-workshop-playback-report.pdf> at 35.

## CHAPTER EIGHT

## FORM, CONTENT AND CONTROL OF QUESTIONS ABOUT COMPLAINANT CREDIBILITY

*[The aim of the Pilot is to] make it better for a complainant, an adult or a child, to give evidence so that they're not re-traumatised by the experience, regardless of the verdict. It should be made as easy as possible for any person to come along and give evidence.<sup>1</sup>*

### Overview

The motivation for undertaking the research presented in this book was to gain a better understanding of why adult rape complainants continue to describe their experience of giving evidence as a significant cause of re-traumatisation. Since the influential 1983 *Rape Study*,<sup>2</sup> most local research on the impact of the trial process on complainants in adult rape cases has involved interviewing participants.<sup>3</sup> In *Rape Study*, the researchers obtained the views on the trial process from judges and counsel. They concluded:<sup>4</sup>

*[T]here was general agreement that the trial is more traumatic for rape complainants than complainants in other trials ... The cross-examination is one source of possible trauma and there tended to be agreement that this is frequently longer and more insistent in rape trials and that one of the main reasons for a detailed cross-examination is to discredit the complainant in front of the jury.*

1 Said by a judge in Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 13.

2 In two volumes (and an analysis of submissions): Warren Young *Rape Study Volume 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983); *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983).

3 For example: Venezia Kingi and Jan Jordan *Responding to sexual violence: pathways to recovery* (Ministry of Women's Affairs, Wellington 2009); Rebecca Parkes "The Journeys of Complainant Witnesses for Sexual Violence Crimes in the New Zealand Justice System" (DCLinPsy thesis, University of Auckland, 2017); Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences: Research report* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018).

4 Prue Oxley "Research Report 4: Results of Questionnaires to the Judiciary and Lawyers" in *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983) at 4.

The research for this book, however, has examined the actual court processes. Analysis of the 40 adult rape cases we had access to makes it very apparent why complainants still say that the questioning process is extremely distressing. It is highly undesirable that this should still be occurring and we believe that the historical, and still current, questioning practices that are harmful (to the complainant individually and to the public perception of the fairness of the criminal justice system) are unnecessary in order for a defendant to offer an effective defence.

While the July 2019 evaluation of the Sexual Violence Court Pilot identifies some very promising outcomes of the changes to pre-trial processes in particular,<sup>5</sup> it is apparent that not all judges in the Pilot are willing to intervene in the questioning of adult rape complainants. More change is needed. That the experience of giving evidence, even in the Pilot, remains challenging is apparent from the words of one of the complainants during re-examination:

**Q:** *In essence what's being suggested is that this was a consensual episode and that you've just made up a story due to either embarrassment or encouragement from others. How do you feel about that suggestion that you've made it up?*

**A:** *I think it's horrific given how much I've had to go through to get here and how many times I've been forced to relive what had happened to me and given the fact that I didn't speak at all throughout the event, I wasn't even asked for consent. I definitely didn't give any and again the fact that I was drunk and asleep prior to the event I wouldn't have been able to and I definitely did not want this to ever happen to me and to have my family and my friends have to go through this traumatic event as well, no I, I definitely – the accusation that I would have made this up is outrageous.*

Defence counsel in the Pilot also may well agree that there is continued existence of a questioning process that has historically given rise to such sentiments. In the evaluation of the Pilot, one defence lawyer is quoted as saying: "I think it's very good that the old brutal days for complainants are gone. ***It's still brutal, but less so.***"<sup>6</sup> However, we are not yet convinced that the "old brutal days" have gone – even for the complainants in the 10 adult rape Pilot

5 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 23–27.

6 At 13. See also conflicting views regarding the extent of changes to the cross-examination process: "[Judges] are stopping defence from badgering [the victim] too much. They're putting a stop to it. [Since the judicial training], they seem a lot more mindful of the victim. It's not very often now that I see a support person go 'Oh, that was brutal'", compared to: "Unfortunately, there's still a lot of questioning in cross-examination which I think is inappropriate and there's not as much control over the questioning as I thought there was going to be when it started": at 67 (see also the range of views expressed by defence counsel at 73).



cases we accessed. In cases where the issue at trial is consent, rather than identification or occurrence, we observed relatively little difference in the scope and content of questioning between the cases in the principal research and those in the pilot study.<sup>7</sup>

Most types of questions asked in cross-examination to test a witness' evidence are the same in rape cases as in other contexts (including in civil proceedings), such as a focus on inconsistencies or on other similar behaviour of the witness. The use of evidence about complainant intoxication is, however, different in sexual violence cases.<sup>8</sup> It is also apparent from this research, and previous studies based on interviews, that the messages such lines of questioning convey to rape complainants are different and the consequential emotional impact is of heightened significance. Further, the challenges to a complainant's credibility are more wide-ranging in the sense that their relevance relies on drawing inferences that relate specifically to (we would say contestable) views and expectations about memory, sexuality and the behaviour of "real" rape victims.<sup>9</sup> In short, the credibility of adult rape victims is usually the principal focus of cross-examination, even though the issue at trial is consent.<sup>10</sup> This is why, we believe, that complainants feel re-traumatised by the experience of giving evidence and why some of them report that they were called a liar for hours and hours.<sup>11</sup>

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- 7 Differences of opinion were expressed in Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) about changes to the cross-examination process (that report covering all cases in the Pilot, not only adult rape cases): "There's a new way of cross-examining complainants and it's a much better way and I think the pilot has brought that out" (prosecutor at 67). "Unfortunately, there's still a lot of questioning in cross-examination which I think is inappropriate and there's not as much control over the questioning as I thought there was going to be when [the Pilot] started" (stakeholder at 67).
  - 8 See Luke McNamara and others "Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects" (2017) 43 *Monash University Law Review* 148 at 163: "Our data-set contained a number of instances where the court was concerned with the significance of the victim's intoxication. The vast majority of these were sexual assault or indecent assault matters and included 28 instances where the credibility and/or reliability of the victim was considered. We note that *no other offence category revealed such a pattern of concern for the credibility/reliability implications of the victim's intoxication.*"
  - 9 See for example Janine Benedet "Judicial Misconduct in the Sexual Assault Trial" (2019) 52 *University of British Columbia Law Review* 1 at 21; Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance and Victim Blaming" (2010) 22 *Canadian Journal of Women and the Law* 397 at 398.
  - 10 "Any relevance to the complainant's credibility, no matter how slight, may be seen as requiring admission of the evidence to ensure a fair trial": Mary Heath "Women and Criminal Law: Rape" in Patricia Eastaugh (ed) *Women and the Law in Australia* (LexisNexis, Sydney, 2010) at 88. We note that in some of the cases, where the witness is seemingly more credible (lacking any apparent motive to lie), more is made of her actions as being consistent with consent. The approach in such cases is confirmed by the appeal decision in *Wilde*, for example, where counsel said on appeal "it was best to run the case on the basis of a misunderstanding between him and the complainant, and an honest reasonable belief on his part as to her consent. He deposed that Mr Wilde accepted his advice on that strategy. There was a problem in putting it to the complainant that she was lying, as there was no apparent motive for the complainant to make up the allegations. Mr Wilde's suggestions as to possible motives for her to lie lacked inherent credibility."
  - 11 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 79.

Of course, the actual questions asked in cross-examination do not always include a direct proposition that the complainant is lying or making it up. It is however the inference of a lack of credibility which gives relevance to the question, whether the question is about an inconsistency, a failure to remember details, a failure to struggle or tell someone straight away, or why she did not block the defendant on her Facebook page immediately after the alleged rape. The inference is, you were not raped, it was consensual sex, later regretted. If you were really raped, you would remember every detail, you would have fought, you would have injuries, you would have gone straight to the police, you would have eschewed any contact with the defendant. Those questions, historically permitted as being relevant to credibility, only have sufficient probative value, in our view, if they are based on the realities of the behaviour of all or the majority of victims, rather than on contestable beliefs (or myths) about how a real victim would behave if she really was raped.

While this kind of evidence, or these kinds of questions, may also have claimed relevance to the issue of consent, the logical link is tenuous. In fact, the claim to the probative value of such evidence (to determine the existence of consent) has been challenged by legislation – for example, by problematising the forensic value of delay (section 127 of the Evidence Act 2006) and by providing that passivity (allowing the sexual connection) of itself cannot amount to consent (section 128A(1) of the Crimes Act 1961). If these questions are asked, including those claimed to be of relevance to an assessment of the complainant's credibility,<sup>12</sup> in our view they need to be balanced by evidence based on the social science research that has repeatedly documented the range of responses a victim of sexual offending may have. Questions based on rape mythology, beliefs that bear little or no resemblance to what is known about how rape victims behave, seem to only pass the relevance threshold due to a long history of repetition, as if such beliefs may become truth through such repetition (and lack of disruption).

While it is, of course, a legitimate focus of cross-examination to challenge the credibility of a witness, in adult rape cases – where consent is at issue – as opposed to other types of alleged offending, we suggest that the majority of defence questions are asked in an attempt to show that the complainant lacks credibility. This focus reflects the significance of findings about credibility in such cases, and also the consequential latitude given to the defendant when offering evidence of the complainant's behaviour on other occasions – even if that behaviour seems to lack a logical connection to the facts in issue. This book allows closer consideration of the legitimacy of some of the ways that complainant credibility is challenged at trial, including by demonstrating the impact of such questioning on complainant experience. Our aim was to consider whether and how challenging complainant credibility can be equally effective and consistent with fair trial rights without the use of marginally relevant evidence and the practice of putting unpleasant and unnecessarily upsetting propositions to the complainant.

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12 The forensic value of questions or evidence concerning the issue of consent (and belief on reasonable grounds) is discussed more fully in Chapter Seven.

### ***Current legislative controls on questioning***

The two main provisions in the Evidence Act 2006 which relate to the scope of questioning in cross-examination, aside from admissibility rules are section 85 (unacceptable questions) and section 92 (cross-examination duties). Both codify duties – section 85 requires the judge to intervene in some contexts,<sup>13</sup> and section 92 requires the cross-examiner to provide the opportunity for the complainant to respond to future contradictions to their evidence.

Section 85 currently provides:

#### **85 Unacceptable questions**

- (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to –
  - (a) the age or maturity of the witness; and
  - (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
  - (c) the linguistic or cultural background or religious beliefs of the witness; and
  - (d) the nature of the proceeding; and
  - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

It is axiomatic that a trial judge's duty "to ensure that litigants ... do not spend time on irrelevant matters in court hearings",<sup>14</sup> as well as the duty under section 85, must be balanced against a criminal defendant's right to a fair trial.<sup>15</sup> In this chapter, we consider whether section 85, particularly regarding questions that are "improper", is being interpreted and applied in a way that offers sufficient support and protection for adult rape complainants – that is, whether it delivers fair process to those witnesses.

<sup>13</sup> See *B (CA182/18) v R* [2019] NZCA 18 at [28], and generally Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (Thomson Reuters, online) at [TP25.04].

<sup>14</sup> *Seimer v Heron* [2011] NZSC 116, [2012] 1 NZLR 293 at [7].

<sup>15</sup> *Metu v R* [2016] NZCA 124 at [23]. There are also fair trial controls on the judge's ability to ask questions under section 100 of the Evidence Act 2006.

Section 92 provides:

## 92 Cross-examination duties

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may –
  - (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
  - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
  - (c) exclude the contradictory evidence; or
  - (d) make any other order that the Judge considers just.

The Court of Appeal has noted that the purpose of section 92 is one of fairness, relating to the “challenge and confrontation of opposing witnesses under the adversarial system”. However, section 92 need not be “slavishly followed where the witness is perfectly aware if his or her evidence is not accepted on a particular point,”<sup>16</sup> or “where it would be clear to the jury that the parties are at loggerheads on that aspect of the case and the likely response is plain”.<sup>17</sup> There is, therefore, a tension between the need to fairly “put the case” and the judicial control of improper or needlessly repetitive questioning. This tension is very apparent in the case extracts in this chapter, and results in our recommendation to resolve more matters of admissibility and scope of questioning pre-trial.

The final part of the legislative context to mention is rule 13.10.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which states:

*A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by **reasonable instructions** or that lacks foundation by reference to **credible information** in the lawyer’s possession.*

In *Adams on Criminal Law*, the authors refer to Canadian case law on the related concept of a “good faith basis”:<sup>18</sup>

<sup>16</sup> *R v Soutar* [2009] NZCA 227 at [27].

<sup>17</sup> *Farmer v R* [2019] NZCA 430 at [16]. See also *Parfoot v R* [2018] NZHC 2702 at [43].

<sup>18</sup> *R v Lyttle* [2004] 1 SCR 193 at [48].

*[A] “good faith basis” is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of **reasonable inference, experience or intuition**. The purpose of the question must be consistent with the lawyer’s role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.*

This extract requires a focus on “reasonable inference, experience or intuition”. We consider that related to this ethical requirement is that of counsel competence – that is, counsel should have sufficient understanding of what is a reasonable inference to draw in all the circumstances. We agree with Elaine Craig on this point:<sup>19</sup>

*Competency requires lawyers to develop self-awareness of their own entrenched social assumptions – to ask themselves what heuristics they rely on in designing and evaluating the defence of a client accused of sexual assault.*

### **Scope of the chapter**

In this chapter, we set out a range of observations about the nature of cross-examination in adult rape cases in which consent is the issue. While the initial focus on the questioning process in this research was consideration of how often rape mythology and the “real rape” schema is relied on or reinforced during cross-examination, audio file access allowed us to consider also other aspects of questioning which the complainant appeared to find distressing.

We also comment on the extent to which the judges relied on section 85 of the Evidence Act 2006 to control cross-examination and how much leeway was given to counsel to challenge the complainant’s credibility or her version of events in reliance on the duty to put the case (codified in section 92 of the Evidence Act 2006). Access to the audio of the complainant’s evidence also enabled us to document how often Crown counsel object to aspects of the cross-examination process. The chapter’s summary includes reference to our reform proposals.

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<sup>19</sup> Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 106.

### *Examples of the complainants' heightened emotionality during questioning*

We begin the discussion by outlining the places in the trials where the complainant appeared to be so impacted by emotion that she did not respond to questions, or her response was considerably delayed. Due to our access to the audio record of the complainant's evidence, we were able to annotate the Notes of Evidence (the transcript) with information about the complainant's heightened emotionality.<sup>20</sup> This was indicated by: long pauses; crying; asking for a break; struggling to give a complete answer; failure to answer; and/or where the judge suggested an unscheduled break following one of these occurrences. Such events occurred when:

- (a) There were challenges to memory and inconsistencies based on a failure to recall minute details of the event or peripheral matters;
- (b) It was put to the complainant that she was lying about the events;
- (c) There was a need for the complainant to recount detailed or unpleasant aspects of the alleged rape itself;
- (d) Complainants were asked upsetting or "disgusting" (to use their words) questions about their behaviour at the time;
- (e) There was reliance on one or more rape myths as the basis of questions, such as:
  - ▶ delay in going to the police;
  - ▶ failure to struggle or call out;
  - ▶ inappropriate clothing choices;
  - ▶ contact with the defendant after the alleged rape; or
  - ▶ lack of injury;
- (f) It was suggested to the complainant that she was responsible for what occurred; and
- (g) There were lengthy and repetitive questions by defence counsel categorised as necessary to put the defendant's case.

Recent local research has confirmed that these areas of questioning are not new,<sup>21</sup> and similar loci of cross-examination were also documented in the 1983 *Rape Study*:<sup>22</sup>

20 Lack of audible emotionality does not mean, of course, that a complainant was not experiencing emotional difficulty. Flat affect is also associated with traumatic experiences and does not always indicate an absence of stress to an internal state of calm – and may in fact be a symptom of post-traumatic stress disorder.

21 Sarah Zydervelt and others "Lawyers' Strategies for Cross-Examining Rape Complaints: Have We Moved Beyond the 1950s?" (2017) 57 *British Journal of Criminology* 551.

22 Angela Lee "Research Report 3: 1980 and 1981 Court Files" in *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983) at 35. See also *R v Seaboyer* [1991] 2 SCR 577 at 598 and 605, McLachlin J noting that questioning which relies on "outmoded, sexist-based" stereotypes, penalises "those complainants who [do] not fit the stereotype of the 'good woman'" and such cross-examination causes "embarrassment or discomfort to the complainant".

*[C]ertain lines of argument or areas of questioning were repeatedly referred to by defence counsel. [As well as] defence arguments around the previous sexual experience of the complainant ... [t]he other main defence arguments or areas of questioning that were put forward were:*

- 1. Lack of resistance, screaming, escape or injury*
- 2. Rape is impossible [related to the physical ability of women to prevent unwanted sex]*
- 3. The complainant behaved in a manner or wore clothing that was sexually provocative*
- 4. The complainant consumed drugs or alcohol*
- 5. There was a close relationship between the complainant and the defendant*
- 6. The complainant did not complain straight away*
- 7. The complaint is false*
- 8. The complainant is unreliable*
- 9. The complainant is confused because of the trauma of what happened.*

*These arguments are generally used when consent is one of the defences ...*

As previously stated, the purpose of the research is to demonstrate when and how questioning may result in avoidable distress. We do not suggest the end to cross-examination or challenge a defendant's right to do so – rather, we query whether this process can be undertaken in a way that is not re-traumatising for adult rape complainants. In order to do so, the first step is to report the findings of our analysis.

### **Challenges to memory based on inconsistencies or failure to recall minute details**

This type of questioning was the cause of heightened emotionality for the largest percentage of complainants, with 12 of the 30 complainants in the principal study and five out of 10 in the pilot study audibly impacted by their inability to remember particular details, or because of challenges about inconsistencies in their reports about the alleged offending.<sup>23</sup> Use was made of inconsistencies between their evidence and their pre-trial statement(s), or inconsistencies in their evidence at trial. A further aspect of challenges about memory occurred in relation to intoxicated complainants – where the jury was invited to draw (negative) inferences about their credibility from evidence of gaps in their memory of the surrounding activities or people (see further below).

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<sup>23</sup> See the similar findings in New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996) at 167–168: “Many complainants became highly confused and distraught when they could not recall these details precisely. The research showed that much time was taken up with questioning the complainant about relatively minor inconsistencies between her trial evidence and what she said at committal or in her initial statement to the police which may have been taken up to five years previously.”

Cross-examination in a case from the principal research, *Depak*, focussed on inconsistencies between the 18-year-old complainant's evidence and what she said in her evidential interview and appeared to result in her getting upset and then apologising for not being able to remember:

Q: *So, [Reji, the defendant] first of all came into the room, hopped onto your bed and said "[CH] and I have broken up. I'm going to crash on your bed". Right?*

A: *Yes.*

Q: *And then he moved closer towards you. You asked him "What are you doing. You are [CH]'s boyfriend", is that right?*

A: *Yes.*

Q: *And the next thing that happened was that you actually fell asleep because you were woken up by Reji trying to get on top of you.*

A: *Yes.*

Q: *So, what you have told the Court earlier about him entering the room, hopping onto your bed, leaving and then coming back 10 minutes later to hop onto your bed again that's not right is it? Because you actually fell asleep –*

A: *He w – he –*

Q: *– in between those two times.*

A: *During the incident he walked in and out of the bedroom a lot and, (shaky voice starts to cry) sorry, it happened a while ago so I can't remember everything like that.*

Q: *That's, sorry, all I'm doing is just clarifying with you what you say happened, okay, so it's?*

A: *I know, sorry. (crying, tissues rustling)*

Q: *So, what I am asking you is which version is correct? Did you fall asleep in-between those two times or did he come back 10 minutes later?*

A: *It would've been the one that I said in the DVD because it was closer to the time.*

Q: *Okay, so you fell asleep and then you were woken up by him trying to get on top of you, is that right?*

A: *Yes.*

In this case, the complainant, Rachel, as other complainants also do, explained why she thought she couldn't remember that detail (length of time), and then stated that what she said in her evidential interview must have been correct as that was closer in time – even though she now had no memory of this part of the evening.

In *Jackson* the complainant, Yasmin Paulin, was questioned about inconsistencies between her evidence at trial and what she initially told the police. Her explanation was that when she first spoke to police it was close in time to the offending and she was still intoxicated and "an absolute mess":



- A: *I did know, I did know it wasn't my boyfriend.*
- Q: *If you did know that, why on earth then would you say to the police that you thought you were having sex with your boyfriend?*
- A: *I had had no sleep, I was an absolute mess. I could have said anything in there, I was just a mess, I didn't even want to be there. (raised voice, yelling)*
- Q: *You could've said anything including something that didn't accurately reflect what occurred in the bedroom with Mr Jackson, couldn't you?*
- A: *I was being asked questions right after it had happened with a cop, I was still in my same clothes, being told that I needed to go and get examined. I was – (starts crying, breaks down)*
- Q: *And you told us in your evidence earlier today that when this episode of anal intercourse was occurring you were lying on your side and you'd been on your side the whole way through, is that what you said earlier?*
- A: *Yes.*
- Q: *Do you recall that you told the police officer when you were talking to her, "The male then rolled her over –" this is what she's recorded you telling her, "– the male then rolled her over and began to have anal sex with her." You said that to the police officer a few hours after this incident, too, didn't you?*
- A: *(sniffing, sighing, nose blowing) I can't remember.*
- Q: *You might not be able to remember but it's a different description to the one you gave earlier today isn't it? Isn't it, Ms Paulin?*
- A: *(no audible answer) (sniffing, sighing, nose blowing)*
- Q: *Please answer the question?*
- A: *It's not different there's just extra things in there.*
- Q: *You were examined by the doctor later that day as you've told us, or accept it happened around midday, do you recall telling the doctor that you touched Mr Jackson's genital area with your hand?*
- A: *I can't remember. (crying, sniffing, coughing)*

This case is one of two in the research in which the complainant's statement was taken by the police within a matter of hours of the alleged rape.<sup>24</sup> The other is a Pilot case, when the offending occurred between 3.30 and 4.30 am and the evidential video interview (EVI) was recorded, beginning at 9.31 am, the same day. This timing is now recognised as being counter to best practice, because of the way memories are encoded and stored. There should, rather, be two full sleep cycles between the event and the full investigative interview:<sup>25</sup>

24 We did not have access to this information for all of the cases.

25 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 19 [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf)

*Scientific information on the stabilization of memory through consolidation has significant implications for the timing of police interviews. A victim interviewed shortly after an assault, or while still very stressed or traumatized, will not be able to retrieve everything that's been encoded into her brain. Two full sleep cycles may be necessary for the episodic memory circuitry to consolidate information that was encoded at the time of a trauma such as sexual assault. Researchers have found that processes occurring during both rapid eye movement (REM) and non-rapid eye movement (NREM) sleep also play critical roles in the consolidation of memories. During memory consolidation, the brain reorganizes and integrates initially fragile memory traces into long-term storage.*

Inconsistencies relied on during cross-examination in both these cases may therefore be explained by the timing of the evidential interview. The complainant seems to indicate awareness that more detail was available to her after the EVI was completed. However, it is not only evidence of inconsistencies that form the basis of a challenge to a complainant's credibility. One of the aspects of the questioning process that was surprising to us, as researchers, was the level of (sometimes peripheral) detail about the alleged rape, as well as the surrounding circumstances, that complainants are expected to remember. The impact of this type of dynamic was also noted by the researchers in *Heroines of Fortitude*:<sup>26</sup>

*Defence counsel worked on this in cross-examination of the complainant and the trial Judge then reinforced the issues by referring to these peripheral issues as highly pertinent to the complainant's credit (which many people would have difficulty recalling even in a situation of consensual sex) related to questions about exact times, exact positions of fingers, penises, clothing and duration of non-consensual intercourse during the sexual assault ...*

An example of the inferences which are invited to be drawn from such failure to remember "critical" details, is provided by the closing submissions of defence counsel in *Damage*:

*And members of the jury these are the really critical issues, aren't they? When it comes to the issue of consent or at least belief in consent. "How were your clothes taken off?" "Where were you?" "What position were you in?" "What was said?" "What was the nature of the sex?" Ms Taylor almost defaulted to the point where she couldn't remember anything except of course that it all happened and that she didn't consent to it.*

*Members of the jury is that really good enough? These are serious allegations that she's making. It's bad enough that she's vague and inconsistent in her interview with the police only three days after this event but when she's pressed to clarify details*

26 New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996) at 168.

*the best really that she could do was say that it was a long time ago and she can't really remember. "But I didn't consent." Is that enough, is that reliable enough, is it convincing enough? I'd submit to you members of the jury it's not, it's nowhere near enough it's not even close.*

However, it is not only in cross-examination that complainants become upset at a failure to recall aspects of what happened. During her evidence in chief in *Depak*, Rachel asked for a break after trying to recount what happened in the house. The judge was very aware that she was having difficulty and suggested that she focus on the actions of the defendant, not the words spoken:

- Q: *What could you hear?*  
 A: *Um, swearing from both sides. I could hear her and him. Can't, oh. ... (silence)*  
 Q: *Can you remember anything that was said specifically?*  
 A: *No, not at, no, sorry.*  
 Q: *And were the voices at a normal level or were they raised?*  
 A: *Raised.*  
 Q: *So how long did the raised voices go on for?*  
 A: *(long pause) I don't know sorry. (very quiet) I've gone blank again. (shaky voice)*  
 Q: *It's okay, do you want a drink of water?*  
 A: *Sorry. (tissues rustling)*  
 Q: *Did it feel like a short time or a long time that the arguing was happening?*  
 A: *Um, this argument felt like a short time. (deep breathing out, sniffing)*  
 Q: *And after the arguing stopped, what were you next aware of?*  
 A: *Him coming into my room or [J]'s room.*  
 Q: *And was that – was that straight after the arguing stopped or was there a time lapse between him coming in?*  
 A: *Um, straight after.*  
 Q: *All right so tell us about that?*  
 A: *Um, (long pause) he came into my room or Ja, – um, [J]'s room and closed the door and then hopped back into the side of the bed and turned me over and said, (sighing, long pause, sniffing) sorry, um ...*  
 Q: *What did he say [CH]? Sorry, Rachel, what did he say?*  
 A: *It's all right. Um, (long pause) sorry my nerves are getting up and ... (quiet voice)*  
 JUDGE: *That's okay, perhaps just tell us what he did. Rather than trying to remember what was said, which you seem to be having difficulty with?*  
 A: *Sorry.*  
 Q: *Tell us what happened. What did he do?*

A: *I don't know what this is. I just keep on going really blank and can't ...*

Q: *(pause) Would you like a wee break?*

A: *Could I just have a breather please? (breathing, sniffing, tissues (but not sobbing))*

Q: *Yes.*

After this break, the judge talked to Rachel about needing to recall the incident itself, rather than the video that she viewed before the trial:

Q: *Now Ms Cowan are you feeling alright?*

A: *Yes.*

Q: *So just remember what I said to you. Just think back to the incident itself, don't think back to the video right because it's about the incident itself that you are giving evidence of, okay?*

It seems to us that this puts the complainant in a difficult position when it comes to cross-examination. The judge tells her to remember the incident, not what she said in the evidential interview, yet the cross-examination is focussed on exploring the differences (including gaps) between her evidence at trial and what she said in the interview. She regularly has to resort to saying that what really happened was what she said in the interview, not what she said in evidence in chief. It is unsurprising that such a situation is upsetting, as well as cognitively difficult, for her.

While inconsistencies form the basis of credibility challenges in many contexts, and are specifically referred to in some jury directions as an aspect of the ways in which juries might make decisions about the weight of the evidence,<sup>27</sup> it is not all inconsistencies that have forensic significance. Katrin Hohl and Elisabeth Stanko conclude that: “psychological research on memory suggests that inconsistencies are a normal measure of human memory and a poor measure of the truthfulness of the allegation.”<sup>28</sup>

In reporting to the Department of Justice in 2019, Lori Haskell and Melanie Randall summarised the relevant findings from research in the specific context of rape allegations and stated:<sup>29</sup>

27 See for example the summing up in *Langley*: “Credibility of a witness can be assessed on two broad bases and they are the credibility of the witness personally and the credibility of the story they tell. As to the first of those, you will consider such things as the demeanour but with the caution that I have mentioned. Consistencies and any inconsistencies or changes in evidence, prevarication in evasive answers, any reasons to lie and a refusal to make a concession when you think concessions were due, memory of the witness and the witness's age and opportunity to observe the material facts are matters to bear in mind also”.

28 Katrin Hohl and Elisabeth A Stanko “Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales” (2015) 12 *European Journal of Criminology* 324 at 337; see also Katrin Hohl and Martin A Conway “Memory as evidence: How normal features of victim memory lead to the attrition of rape complaints” (2017) 17 *Criminology & Criminal Justice* 248.

29 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 10 [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf)

*In the aftermath of trauma, victims may make statements that appear to be incomplete or inconsistent. They may also seek to hide or minimize behaviors they used to survive, such as appeasement, or flattery, out of fear that they will not be believed or that they will be blamed for their assault.*

*But what might appear to be an “inconsistency” in the way a victim reacts, or tells her story, may actually be a typical, predictable, and normal way of responding to life-threatening events and coping with traumatic experiences. Many responses that seem inexplicable to those who are unfamiliar with normal trauma responses can be appreciated by understanding the brain’s way of coping with and processing overwhelming psychological events.*

It appears then, at least in the specific context of sexual violence, that inconsistencies over time may not be predictors of mendacity, but rather the consequence of experiencing and managing trauma.<sup>30</sup> We are aware that such claims may themselves be contestable, but at the very least complainants should not, we believe, feel embarrassed, ashamed or upset about an inability to remember details consistently over time.

It is unlikely to be possible, within the current procedural processes, to prevent or control questioning about inconsistencies, in a way that takes into account the nuances of which inconsistencies support or detract from the complainant’s credibility. However, what is important, in our view, is the guidance the juries are given about what weight to place on inconsistencies. In one of the Pilot cases,<sup>31</sup> the judge did refer to whether there had been “innocent and understandable inconsistencies”, but apart from the jury being told to rely on their own common sense, no further guidance was given as to what inconsistencies may be “understandable”.<sup>32</sup> The most often used direction with regard to the use of evidence of inconsistencies refers to “significant” discrepancies.<sup>33</sup>

30 See for example Jane Herlihy and Stuart Turner “Untested assumptions: psychological research and credibility assessment in legal decision-making” (2015) 6 European Journal of Psychotraumatology 27380; Jane Herlihy, Peter Scragg and Stuart Turner “Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study” [2002] British Medical Journal 324.

31 “When you are assessing the credibility of those witnesses, consider those statements. If a witness has been inconsistent, that might be something you want to consider. Are they innocent and understandable inconsistencies or do they indicate a lack of credibility or reliability? Do the same if someone has been consistent. Does that help you determine whether somebody has been credible or reliable?” (*Waititi*).

32 See also the summing up in *Vandenberg*: “Now when you’re dealing with the reconstruction of past events in people’s lives, it is difficult or perhaps it’s unreasonable to expect that you’re going to get a completely solid account. If there are inconsistencies and inaccuracies in what people say, is that really a reason to discount their evidence on major matters or are they such as to raise a reasonable doubt, one which makes you unsure of guilt.”

33 This extract, with variations based on the facts of the case, formed part of the summing up in two of the Pilot cases (*Cropp* and *Redman*) and in five of the cases in the principal research (*Depak*, *Edwards*, *Moss*, *Wilde* and *Young*).

*People's recollection of events usually contain minor inconsistencies in matters of detail, especially events 17 months ago, late at night, after drinking. You might be suspicious of people who have their stories off so pat that every last detail dovetails perfectly. **Sometimes discrepancies are significant enough they may cause you to doubt a witness' evidence. Is a witness' evidence supported by other evidence, especially independent evidence?***

This looks likely to be a standard form direction, rather than one specifically crafted or adapted for sexual violence trials. While “independent evidence” may well assist decisions about a witness' credibility, there is a lack of such evidence in many rape cases where consent is at issue. This type of judicial direction may therefore encourage the jury to further question the lack of independent evidence, in situations where the complainant's memory was (understandably, we would say) affected by the alleged events themselves.

As noted earlier, recall of minute details, including the order of particular events, is expected of many of the complainants in the research. In *Smythe* the complainant was questioned about her version of events in terms of how and when the blankets were taken away from her:

Q: *So, he was on the side of the bed closest to the wall, wasn't he?*

A: *Yes.*

Q: *And you can remember him taking your blankets off you?*

A: *Yes.*

Q: *So, at that stage you were still lying next to him and you can remember him taking off the blankets?*

A: *Yes.*

Q: *Did you say anything to him at that stage?*

A: *I don't remember.*

Q: *But you were awake weren't you, you woke up when all of a sudden it got colder?*

A: *Mhm.*

Q: *Isn't it logical that you would say something like, "Stop that, don't do that"?*

A: *Yeah it is logical.*

Q: *At that stage would have been much easier for you to get out of the bed than for him wouldn't it because to get out of the bed he has to clamber over you, given that he's hard up against the wall?*

A: *Yeah.*

Q: *All you have to do is to put your feet on the floor?*

A: *Mhm.*

Q: *So, as you look back, you're not sure if you said anything when he took the blankets off you, right?*

- A: No.
- Q: *What's the next thing that he did?*
- A: *He climbed on top of me.*
- Q: *I thought you said something about how he tried to move your underwear?*
- A: *Yeah.*
- Q: *Was he on top of you when he was doing that?*
- A: *Yeah.*
- Q: *Are you sure?*
- A: *No.*
- Q: *So, you're not sure where his body was positioned when he was trying to take your knickers off?*
- A: *Not sure but I just remember him being on top of me.*
- Q: *If he pulled the blankets off you, would that mean that he pulled them back towards himself to a degree?*
- A: *I don't know.*
- Q: *Think about it logically, that's got to be so doesn't it, to pull the blankets off you, he's got to pull them back towards himself?*
- A: *That would be logical but I don't know.*
- Q: *But logically once he does that there's a big wad of blankets between him and you, isn't there?*
- A: *If that's how it happened, if that's what he did then yeah.*
- Q: *So, it may be that you were still lying on your side of the bed and he was behind you when he began pulling your knickers?*
- A: *Maybe. I don't remember.*
- Q: *Or it may be that he was on top of you trying to pull your knickers down with one hand, is that right?*
- A: *I remember him being on top of me trying to take my underwear off, yes.*
- Q: *But the reality is you don't know all of the details, do you?*
- A: *No, I don't.*

Current understandings of how memory works, however, indicate that it is unrealistic, and irrational, “to expect victims of sexual assault to recall all aspects of their traumatic experiences with detailed accuracy from start to finish. That is not how the brain works when the defence circuitry has kicked in.”<sup>34</sup> Katrin Hohl and Martin Conway go further, saying that

34 Lori Haskell and Melanie Randall *The Impact of Trauma on Adult Sexual Assault Victims* (Department of Justice Canada, 2019) at 23 [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf)

while “inconsistencies, lack of detail, errors and omissions in the victim account undermine its credibility in the eyes of legal agents and put the complaint at risk of attrition, *the modern view of human memory considers all of these typical features of a normal memory.*”<sup>35</sup> However, perhaps unsurprisingly, questioning complainants about their lack of memory about the fine details of the events formed the basis of nearly all of the 40 cases in this research – and such questioning often impacted on the complainant’s emotional experience of giving evidence. One of the judges in the Pilot, while perhaps being overly optimistic about the current practice, explains the rationale for the ongoing focus on the complainant’s inconsistencies and gaps in her memory:<sup>36</sup>

*People’s memories fade. In the past we have had complainants being cross-examined in detail about various things and they can’t remember, so that tends to create a doubt in the jury’s mind because the jury have been told multiple times that they need to be sure. If you have got a witness sitting in front of them saying they can’t remember this and they can’t remember that, even if it’s completely peripheral and has no real bearing on the charge at all, it can create a doubt in the jury’s mind.*

The wider impact of forensic memory expectations, of which complainants are well aware, is the impact on their well-being in the time leading up to the trial (part of the reason that fast-tracking is so important).<sup>37</sup> The tension between the personal imperative of needing to forget the details and the demand of the criminal justice system that the complainant remember was also noted by the researchers of the 1983 *Rape Study*.<sup>38</sup>

*Many victims said that they were not only expected to, but blamed for not being able to, recall details with sufficient accuracy to meet the requirements of the court process: “I got accused of lying. It was so long to try and remember every single detail. I was trying to forget it all psychologically and having to remember it too.”*

We agree with Elaine Craig that, given the current understandings of the significance of inconsistencies and failure to recall the peripheral details of the alleged offending or surrounding circumstances, “persistent repetition on minute, collateral details should not

35 Katrin Hohl and Martin A Conway “Memory as evidence: How normal features of victim memory lead to the attrition of rape complaints” (2017) 17 *Criminology & Criminal Justice* 248 at 261 and 262: “Perhaps, however, it is not only misconceptions of human memory that motivate police officers, prosecutors and juries to seek highly consistent, highly detailed and error-free witness testimony from the complainant. Might the nature of human memory evidence be fundamentally incompatible with the evidentiary demands of the criminal justice system?”

36 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 72.

37 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.6] ff.

38 Joan Stone, Rosemary Barrington and Colin Bevan “Research Report 1: The Victim Survey” in *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983) at 60–61.



be accepted by trial judges”.<sup>39</sup> We discuss the extent to which judges intervene to control such questioning in the following sections, noting the need for more consistent and regular control of this type of questioning.<sup>40</sup>

### Challenges to memory and reliability due to complainant intoxication

As previously noted, evidence of complainant intoxication was also used to challenge credibility.<sup>41</sup> In *Waititi*, a Pilot case, defence counsel invited the jury to doubt the complainant’s evidence because of the gaps in her memory (caused by intoxication):

*Now I personally don’t care if the complainant’s a drinker or not, but that’s relevant to this trial, because if your key witness comes to Court and gives evidence where they have significant difficulties recording huge tracts of the night, how can you all go into that back room there and say to each other, “I’m sure beyond a reasonable doubt that what she said happened”?*

Research on the effect of intoxication on memory of sexual assault, however, indicates that accuracy is not impacted by intoxication alone – and although peripheral details are remembered less accurately than central details, that happens regardless of intoxication level.<sup>42</sup>

In *Waititi*, the only guidance the jury was given in the summing-up with regard to the impact of intoxication on the complainant’s evidence was that **they** should decide what effect it had on the complainant’s honesty or reliability:

*All the witnesses were drinking. Some consumed cannabis. You will need to take some care about that. Obviously, if people consume enough alcohol or cannabis, that can affect their perception of what is going on around them. It can affect their ability to remember and, therefore, relate or describe or later relate or describe those events. Ensure that you factor all of that into your assessment of all of the witnesses who were at the party. You decide whether any witnesses were affected by alcohol or cannabis. You decide what effect, if any, that has on their honesty or reliability.*

39 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 143.

40 Note the acknowledgment of disparities between judges in Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 67–69.

41 See also Chapter Seven at 271.

42 Heather D Flowe and others “Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony?” (2016) 24 *Memory* 1042 at 1058: “Our findings suggest that intoxicated victims can provide accurate information to the police [at least within a 24-hour to four-month delay]. Although compared to sober women, intoxicated women may remember less information, our results imply that when intoxicated women provide testimony, the information they provide is just as accurate as sober women, all other things being equal”.

In *Yamada*, one of the cases in the principal study, the judge in summing up noted the impact of the “considerable” quantity of alcohol consumed by all of the witnesses, but noting “although it is of course your assessment ... they were doing their best ... to recall what happened.” This was one of two cases in which the judge advised the jury not to get “bogged down in peripheral issues”, unless they were of the view that “detail like that will assist ... in assessing credibility”.<sup>43</sup> In *Langley* the judge said more about why a focus on such detail may not be of assistance, the only example of this point in all 40 cases being made by the judge :

*Inaccuracy about secondary or marginal or unimportant facts often arises because the attention of the witness was focused on central facts or central events. Testimony is often accurate about essentials but not about peripheral matters.*

### Educating jurors about memory

Giving guidance to jurors on aspects of memory has in the past been resisted due to the often-held (and expressed) view that this is a matter of common sense, and unnecessary:<sup>44</sup>

*You need to take a common-sense approach to the issue of the accuracy of memories. As to this issue you may perhaps take any particular claim of lack of memory as resulting from being asleep or unconscious, in other words no memory has been formed or stored, or being the result of a genuine loss of memory or inability to recall something, or being an implausible and unbelievably claimed loss of memory. These are issues for you to think about using your own knowledge of what might be expected in the circumstances. We all have a layperson’s working knowledge of how memories work, and you will simply combine your collective knowledge and common sense when assessing where you think the truth lies with regard to claimed memory loss.*

However, in *H (CA376/2017) v R*<sup>45</sup> the Court acknowledged “it is arguable that jurors may have misconceptions about memory and the recall of events that might justify providing them with expert counter-intuitive evidence about memory”, supporting the use of agreed statements for the jury. The Court declined to endorse the particular directions that were used, by consent, at the trial. The directions included the following material:<sup>46</sup>

43 In one Pilot case the summing-up included: “With regard to this issue of weight that you give any item of evidence, some evidence of course may simply be context such as location, lighting, the relationships between the participants, et cetera, while other evidence deals directly with the events in question. *Some evidence is of just the most peripheral relevance.* For example, questions asked and answers given about [a particular piece of evidence] do not help you at all, I suggest”.

44 From the summing up in the Pilot case of *Sarkisian*. See also *D (CA95/2014) v R* [2015] NZCA 171 at [27]–[28], but the Court also acknowledges that “there are respects in which the workings of memory are not common knowledge”: at [29].

45 [2018] NZCA 376 at [21] (not a case in this research).

46 At [35].

*Memories are not permanently stored as if recorded on video tape, unaltered, to be played back some later time as an exact recording of the event. Instead, we reconstruct memories from information available to us during memory recall. Because remembering is a constructive process, memory errors can occur. We can leave details out during recall or we can incorporate incorrect details into the event. We can be very confident in the accuracy of our memory even when there are errors in what we recall. We forget far more than we ever remember. We are more likely to forget ordinary every day events. We may remember the gist or main point of something that has happened but may forget the details. We are more likely to remember and remember accurately events that are distinctive or significant for us ...*

*Memory is better for experiences that are distinctive. However, we are more likely to remember, and remember accurately, things that are distinctive, events, things and people who were significant to us in some way or stand out from the ordinary than things that are more mundane or that are peripheral to a distinctive event. We are more likely to forget the specifics of neutral, mundane events, although we usually retain the gist of how routine events usually occur. For example, it is most unlikely that we will remember what we had for dinner on a specific evening a month ago unless it was a special occasion or we eat the same thing all the time.*

*We are more likely to remember very positive events and, especially, very negative events because these events are usually distinctive and also have significance to us. However, even for distinctive or significant events, over time we may lose the specific details for the memory but retain the gist or the central and most significant aspects. This means that although we will know that an event occurred, we may become inaccurate in our memory for some of the details. In particular, details that were less important at the time when encoding of the memory may be more likely to be forgotten. It is also more likely that the central or emotionally outstanding aspects of the event are often encoded well and thus retained over time, while peripheral details are not encoded well to begin with and as a result may not be retained over time.*

Very little guidance was given to the juries about the operation of memory in the 40 cases in this research. In only one case from the principal research (*Langley*), and none in the Pilot, did the judge go beyond instructing the jury to use their own “collective knowledge” and “common sense” based on a “layperson’s working knowledge of how memories work”. In *Langley* the judge said:

*As to the issue of memory, let me make a brief remark or two. Memories are not stored as in a computer but rather in the human brain which is not perfect so memories are not always perfectly accurate. A memory has to be first acquired then stored and then recalled. The stage at which memories are retrieved, that is when a person is asked to recall what has happened in the past, will inevitably be*

*influenced by cues available at the time or things that might jog the memory. So the accuracy and comprehensiveness of any person's recall may depend on factors such as the time that has passed since the event or events, the personal significance of the event, the occurrence of other related events, why and by whom the person is being asked to recall and the types of retrieval cues available at the time such as the presence or absence of photographs. So, you need to think about those sorts of things when making a decision about particular evidence which depends for its reliability on the accuracy and comprehensiveness of a witness's recollection of what was said and done.*

We consider that juries should be given agreed material about the impact of trauma on memory and recall,<sup>47</sup> as well as more general information about human memory, which may well be counter-intuitive to a “layperson's working knowledge”. As is apparent from this research, there is variation in approach regarding what juries are told (even in cases with very similar fact patterns). We also recommend the introduction of direction on the meaning of inconsistencies, similar to those already in use in a number of our comparator jurisdictions, including Victoria.<sup>48</sup>

#### **54D Direction on difference in complainant's account**

- (1) If, after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that there is evidence in the trial that suggests a difference in the complainant's account of the offence charged that is relevant to the complainant's credibility or reliability, the trial judge must direct the jury in accordance with subsection (2).
- (2) In giving a direction referred to in subsection (1), the trial judge must inform the jury that –
  - (a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and

47 We recommend the process followed by the New Zealand Law Commission in drafting *Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) for example (which involved “hot-tubbing” a number of leading psychologists).

48 Section 54D of the Jury Directions Act 2015 (Vic). See also section 293A Criminal Procedure Act 1986 (NSW) and the *Crown Court Compendium* (E & W): “Just because W has not given consistent accounts does not necessarily mean that W's evidence is untrue. Experience has shown that inconsistencies in accounts can happen whether a person is telling the truth or not. This is because if someone has an experience of the kind alleged in this case, their memory may be affected in different ways. It may affect that person's ability to take in, register and recall the experience. Also, some people may go over and over an event afterwards in their minds and their memory may be clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may have difficulty in recalling the event accurately”. <https://www.judiciary.uk/wp-content/uploads/2016/06/crown-court-compedium-part1-jury-and-trial-management-and-summing-up-dec2018.pdf>

- (b) differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and
- (c) experience shows that –
  - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
  - (ii) trauma may affect different people differently, including by affecting how they recall events; and
  - (iii) it is common for there to be differences in accounts of a sexual offence; and

**Example**

People may describe a sexual offence differently at different times, to different people or in different contexts.

- (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and
- (d) it is up to the jury to decide –
  - (i) whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability; and
  - (ii) whether the jury believes all, some or none of the complainant's evidence.
- (3) The trial judge may repeat a direction under this section at any time in the trial.
- (4) This section does not limit what the trial judge may include in any other direction to the jury in relation to evidence given by an expert witness.

Further, complainants should be advised that it is to be expected they will not have a clear, fulsome or consistent memory of what happened, and provided with support to manage questioning that is focussed on inconsistencies or aimed at gathering detailed evidence on the events at issue. We also recommend that prosecutors advise complainants of their ability to consult the transcript of their EVI, or the written statement to the police, in order to refresh their memory.<sup>49</sup>

### **Suggesting to the complainant that she is lying about being raped**

An essential part of defending a rape charge where the issue is consent is challenging the complainant's version of events – either by suggesting that her behaviour was consistent with consent, or that she was not telling the truth about what happened. It is rare that the defendant in an adult rape case would assert that the complainant's evidence is a complete

49 Crown Prosecution Service (E & W) "Speaking to Witnesses at Court" at [3.4(c)] <https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court>

fabrication (especially given the *Solicitor-General's Prosecution Guidelines* concerning prosecutorial decisions),<sup>50</sup> but questions about whether the complainant consented or is misrepresenting aspects of what allegedly occurred are bases for legitimate challenges. Cross-examination aimed at putting alternative scenarios or suggesting the complainant is mistaken in her evidence is entirely permissible – what this research aimed at uncovering was instances of where the scope of the actual cross-examination becomes impermissible because of breaches of ethical obligations or rules of court.

There will undoubtedly be a disconnect between counsel's view of what is legitimate questioning and the complainant's experience of that questioning. In a number of the cases in this research the complainant strongly resisted the inference that she was making things up or not telling the truth, becoming angry and sometimes outraged, rather than upset. In others, the suggestion that she is lying, and has continued the lie over time, resulted in responses that we transcribed as distress as in the following three case examples:

Q: *I'm going to put it to you again and suggest that, whilst it may be something you regretted and wouldn't have done sober, all sexual activity that took place in the bedroom, you did freely, and it wasn't against your will.*

A: *It was against my will.*

Q: *You have **made up the allegations** that you described yesterday to try and salvage the situation with Dion at that time, haven't you?*

A: *I don't understand that sorry.*

Q: *You've only made the allegation of rape against Mr Edwards and other sexual violations in an attempt to salvage things with Dion, at least at that time.*

A: *I don't know what salvage means sorry.*

Q: *You mentioned you were, didn't want to tell Dion about the incident?*

A: *Yes. (quiet)*

Q: *I'm suggesting that, once he found out, your way to explain the situation was to make allegations that you didn't want to do what happened to you that night, and you can comment if you wish.*

A: *(no audible answer) (long pause)*

...

Q: *Ms Sik, I put it to you that you know what happened on that Saturday night and Sunday morning, **you just don't want to admit it.***

A: *I don't know what happens. (breathing out)*

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50 Which requires ("the Evidential Test") that "the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction": <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf> (1 July 2013) at [5.1.1].

Q: *And the reason I'm putting that to you that you know it is because of what you said to Mr Yamada as you were getting dressed before you left, "Don't tell anyone at work about this."*

A: *That didn't happen.*

Q: *So you say.*

...

A: *(big breath out) I just wanted to give him a second chance, be friends and not be weird like that.*

Q: *You're lying about what you claim Mr Masters did to you, aren't you?*

A: *No I'm not.*

Q: *You acted like a drama queen over all of this didn't you?*

A: *No, I didn't. (getting more assertive, still pleading tone)*

To counsel and judges, these interactions are seemingly unremarkable, and not worthy of intervention.<sup>51</sup> To complainants, however, who are giving evidence of their experience of being raped, who have already been dealing with the processes of the criminal justice system for some time, and for whom the courtroom is an alien and unfamiliar place – these questions are heard as allegations that they are lying, with the questioner contradicting and disbelieving her reality. It is therefore unsurprising that these types of questions are distressing and upsetting. However, in our view, in most cases it would seem possible to challenge the complainant's version of events without *directly* putting the proposition that they are making it up or lying, even if that may be an inference that is invited.

With regard to this last example (below), we do not consider the question in bold was necessary to make the point that the complainant's evidence is not accepted and that she had a motive to lie. While in this interchange the 18-year-old complainant is struggling to understand what is being put to her, she had already said she did not make it up so in our view the repetition and language choice was unnecessary:

Q: *Well I'll start from where I should have started. I put it you that what happened was that you willingly had sexual intercourse with Reji.*

A: *No, I didn't willingly. If I made up the story to, you know, still be friends with [CH] either way I'm not friends with her any more. It doesn't, that doesn't, you know, like, I wouldn't be here if I was making something up because, you know, it just isn't, sorry. (starts crying, tissues rustling)*

51 Except to the extent that the complainant is unclear on what the question "to salvage" means. This is addressed, but not the impermissibility of the underlying premise – making up the claim to save another relationship – and hence its irrelevance (see further Chapter Five at 163).

Q: *Well can I put it to you that it is better for you to be a victim rather than the woman who had consensual sexual intercourse with her mate's boyfriend?*

A: *I don't –*

Q: *Do you understand my questions?*

A: *No, I don't understand.*

Q: ***That you lied about being raped because it was easier for you to be a victim, a rape victim, rather than someone who had slept willingly with her mate's boyfriend.***

A: *No, I'm not making it up.*

While it is, of course, consistent with the role of a cross-examiner to challenge the complainant's account of events, by inconsistencies or by suggesting other possible inferences which could be drawn from her behaviour, suggestions that the complainant is lying about being raped or has made a false allegation reinforces the myth that false complaints are common. We discuss this matter further in Chapters Five and Nine, but here also note that not only are false complaints of rape relatively rare, and even rarer are those that progress to trial, research suggests that with regard to cases in which consent is at issue it is highly unlikely a false rape allegation has been made:<sup>52</sup>

*When a woman says she's been brutally raped by seven men at a public party on a bed of broken glass ... and when that woman has a history of strange lies ... there's nothing wrong with being skeptical. But if a woman without any history of dramatic falsehoods says she went home with a man and, after they'd kissed a while consensually, he held her down and forced her into sex – in the absence of compelling evidence to the contrary, you can just assume it's true. This is not because of any political dictum like "Believe women." It's because this story looks exactly like tens of thousands of date rapes that happen every year, and nothing at all like a false rape accusation.*

### Questions about particularly detailed or unpleasant aspects of the alleged rape, including complainant behaviour

Recounting precise details of the alleged rape will be difficult for most complainants – whether that forms part of evidence in chief or cross-examination. In Chapter Four we suggest that to the extent possible, the need for the complainant to give precise details of penetration (where not at issue), or to name body parts, should be obviated by the use of an agreed statement of facts (section 9 of the Evidence Act 2006). However, we noticed a number of occasions in which questions about alleged behaviour by the complainant

<sup>52</sup> Sandra Newman "The truth about false rape allegations" Quartz (2017) <https://qz.com/980766/the-truth-about-false-rape-accusations/>. See also Chapter Five.



resulted in distress, anger and frustration. In a number of these cases, the complainant was unable to explain or acknowledge her behaviour as she had gaps in her memory, or, as in *Yamada*, the prosecution case was that she was severely intoxicated and drifting in and out of consciousness. As part of a challenge, it seems, to the level of her intoxication and her willingness to participate in the sexual activity, the cross-examination focussed on what had happened to her tampon, with the defendant suggesting she went to the toilet and removed it, so could not have been “that drunk”:

- Q: *I need to go back and cover something about you say you had a tampon, you had a tampon in because you had your period, and you say that when you'd got home you didn't have the tampon in, right?*
- A: Yes.
- Q: *And you can't recall taking it out yourself?*
- A: *(no audible answer).*
- Q: *They don't come out themselves do they –*
- A: *No, they don't.*
- Q: *– you've got to take them out, there's a string on them, and then you've got to pull them out, right?*
- A: Yes. *(crying)*
- Q: *So, are you suggesting, trying to suggest to this jury, that you think that Rangi [the defendant] put his fingers in your vagina and pulled out your tampon, is that what you honestly think happened?*
- A: *I don't know what happened. But it wasn't in there.*
- Q: *I'm going to put to you another scenario, and that's this, is that when you went to Rangi's that night you had left your underwear at work and you were wearing your jeans without undies on, do you accept that?*
- A: Yes.
- Q: *And that when you were put to bed by – after being in the bathroom, you were put to bed, you still had jeans on and Rangi's rugby top on and that you had your tampon in, right?*
- A: Yes.
- Q: *I'm putting to you that you got up to go to the bathroom?*
- A: No.
- Q: *And that you removed your tampon and probably flushed it down the toilet?*
- A: *How could I when I was unconscious?*
- Q: *I'm putting to you that you weren't unconscious –*
- A: *That's what you're putting to me, yes.*
- Q: *You managed to get up, maybe you can't remember. That you used the bathroom, you removed the tampon?*

A: *No, I don't recall that happening.*

Q: *That you flushed it down the toilet?*

A: *No.*

Q: *And then you went back to the bedroom leaving your pants undone and your pubic hair partly exposed.*

A: *(no audible answer)*

JUDGE: *That's a no then?*

A: *No, that's a no.*

DEFENCE: *Well the only other explanation about the tampon then, is, if what you're saying is true, he must have put his fingers in your vagina and removed it and disposed of it, mustn't he?*

A: *I don't know what happened to the tampon.*

Q: *Well you need to think about what might have happened to it.*

A: *I don't know I can't give you an answer if I don't know. (yelling)*

Q: *I put it to you he didn't remove your tampon. You did. (complainant sighing)*

There is no intervention in this line of questioning, despite its marginal relevance to either her credibility or whether she consented. In closing, defence counsel made the submission that she must have removed the tampon, as it would be implausible that the defendant did – and so this casts doubt on her evidence:

*Her evidence about the tampon is also significant, I suggest to you. On her account she's effectively saying, she thinks he removed a tampon and then disposed of it to have sex with her. Well, I suggest to you that's entirely implausible. No man's going to pull a tampon out to then go on and rape someone. That just ain't going to happen.*

The suggestion being made here (based on, we presume, counsel's own world view), is that it would be unthinkable for a man to remove a woman's tampon in order to have sex with her, while common, or unremarkable, that a woman would do so, even when heavily intoxicated to the point of vomiting.

The judge does respond to the lack of evidence concerning the removal of the tampon during summing up. While this response pushed back on the use that could be made of such a claim about her behaviour on the night, Grace was nevertheless (needlessly) asked multiple questions about her menstrual cycle, including at which points she might expect significantly heavy bleeding, her choice of sanitary items and how and where she would normally dispose of her tampons. Given the scope of the cross-examination, the Crown also needed to revisit some of these matters in re-examination. While her ability to get to the bathroom was a legitimate matter to be explored, we are of the view that the scope of the questions went beyond what was required to make this point, and this aspect of the cross-

examination was unnecessarily lengthy (and therefore “improper” in terms of section 85 of the Act). Similar observations can be made about other questions put to complainants, which they themselves described as “disgusting” – for example, in *Moss* regarding Vivienne’s clothing at the party and whether she was wearing underwear:

Q: *And you came back to the party wearing that black dress that you sometimes wear to work?*

A: *No.*

Q: *In fact, the reason you have something white underneath is because it is very short, is that right?*

A: *What do you mean the reason – I didn’t wear a black dress. I don’t know what you’re talking about something white. (fast, loud, aggressive)*

Q: *Your black dress is a very short dress, isn’t it?*

A: *No. I wouldn’t wear a short dress to work. I don’t – I didn’t wear a short dress to the party. (loud, angry, arguing)*

Q: *And you were – he’ll say that you lifted your dress up and you weren’t wearing underpants?*

A: *Oh, that is disgusting. (resistant, raised voice, emphatic)*

Q: *Even though you were quite intoxicated?*

A: *Absolutely no way would I do that.*

Q: *I use the phrase quite intoxicated because that’s what you said to the police that when you opened the door you were quite intoxicated?*

A: *Yes, I was intoxicated. No, I did not wear a short black dress over to the party with no underwear. (raised voice, determined, insistent)*

Q: *And [the defendant] had to take you home because he was concerned about that behaviour?*

While these questions (and the supporting evidence of other friends of the defendant) related to the defendant’s version of events, it is difficult to accept that such evidence is sufficiently relevant, either to the fact of consent or to the assessment of Vivienne’s credibility.<sup>53</sup> Coupled with this issue is our concern that offensive propositions, made in reliance on contestable assumptions, add to the unpleasant and distressing nature of giving evidence. While Vivienne appears angry and insistent in this interchange, rather than tearful, we believe that questioning which results in this kind of heightened emotionality also contributes to an overall negative experience for complainants and therefore must be carefully and consistently controlled.

53 Given that the offending occurred after Vivienne had left the party and gone home to bed to sleep – with the defendant following her, uninvited, sometime later.

### Questions that relied on one or more rape myths or behavioural expectations

In relation to this particular aspect of our inquiries, we were unsurprised to notice that reliance on rape myth in the questioning process did cause episodes of heightened emotionality for many complainants. For example, in the following two extracts (one from the principal research and one from the pilot study), the cross-examination is focussed on why the complainant did not struggle or cry out during the alleged rape.

- Q: *So, you are saying you lay there as a brick, didn't moved, had your eyes squeezed shut and just wanted it to be over?*
- A: *I fought as best I thought I could fight at the time. (voice cracks)*
- Q: *So, are you saying that you lay there like a brick, didn't move, had your eyes squeezed shut and just wanted it to be over?*
- A: *I did my best to say no as many times as I could. I was frightened, and he was heavy and he was pushing my face and he was spitting on me, and holding me. (heavy breathing)*
- Q: *You don't agree that –*
- A: *I am a small person, there was only so much I could do under the weight of his body.*
- Q: *So, you lay there as a brick, didn't move, had your eyes squeezed shut and wanted it to be over is not how it happened for you in your claim of this rape?*
- A: *Those are not my – that – I've done my best to describe my ordeal. (voice cracking, sounds like she is trying not to cry)*
- Q: *You were about to say those are not your words Ms.*
- A: *Well they may be words from a statement I remember, I, I've done the best to describe what happened during that time, to you.*
- Q: *That's what you said to [the police officer]? Was it incorrect?*
- A: *I have done my best to say as much as I can say. (sounds exasperated)*
- Q: *[Your friend] said she thought you would have kicked and screamed and you said you thought you would have too, does that refresh your memory?*
- A: *... I always said to myself if that ever happened to me, I would fight and until I was in that situation myself, I had no idea what those people went through. (voice shaking, high pitch)*
- Q: *That never happened to you though did it?*
- A: *Yes, it did. (voice cracking)*
- Q: *You do agree he left, though don't you?*
- (pause – then complainant starts crying, heavily and loudly) (Moss)*

...

- Q: Now you do remember your pants being pulled down, correct?
- A: Yes.
- Q: Which means you were awake when that occurred, correct?
- A: Yes.
- Q: Why did you not resist that?
- A: I didn't resist anything, I just didn't really react in any way. All I can remember is pretty much just lying there, 'cos I was just like out of it. Like I came to and I had consciousness, but because I was just so in and out of it and I was so drunk I just had no motor skills. I just didn't, I don't remember moving arms or anything I'm sorry. *(voice trailing off)*
- Q: Do you remember him pushing into you hard, do you remember that?
- A: I definitely remember that.
- Q: Why did you not do or say anything then?
- A: I don't know. *(voice very shaky, crying)*
- Q: Okay. There were – Ms Sephton this won't take long. There were other people in the house that you trusted and knew?
- A: Yeah. *(voice very shaky, crying)*
- Q: Would this have been a chance to call out possibly?
- A: I wish I had. *(voice very shaky, crying)*
- Q: But from your answer I understand you accept that you didn't call out?
- A: Yeah, I didn't. *(voice very shaky, crying)*
- Q: And at no stage you pushed this gentleman away from you?
- A: *(crying)* I just didn't do anything, I didn't move. I don't remember touching him. *(crying, sobbing)* *(Salah)*

In both cases the complainant appears upset to have to acknowledge that she did not behave as she thought she would have, or perhaps how she should have behaved.<sup>54</sup> In neither of these cases (or indeed in any of the 40 cases in this research) was counter-intuitive or expert evidence given, nor did this type of information form part of the jury directions. No explanation was provided that lack of physical resistance is not uncommon and indeed that consent does not follow from the mere fact of a lack of resistance (section 128A(1) of the Crimes Act 1961). No evidence was offered nor directions given to assist the jury to assess the significance (if any) of the complainant's failure to resist.<sup>55</sup>

54 Although we accept that with the example from *Moss*, the complainant may have become distressed due to the focus on her inconsistencies.

55 In *Salah* the judge referred to the defendant's reliance on her absence of resistance to establish that he had reasonable grounds to believe she was consenting: "[H]e believed that Ms Sephton was consenting to intercourse because she physically took part and didn't say no or push him away." See also Chapter Seven at 309.

Other examples of reliance on rape mythology to challenge the complainant's credibility, which appeared to lead to complainant distress, included: the failure to tell anyone straight away;<sup>56</sup> the failure to cut ties with the defendant following the rape;<sup>57</sup> and, dressing inappropriately.<sup>58</sup>

### Suggesting to the complainant that she was responsible for what happened

Previous research has identified that juries are asked to draw inferences from the complainant's behaviour that she was somehow responsible for the alleged offending:<sup>59</sup>

*It seemed that defence counsel often asked questions which inferred that the responsibility for the sexual assault was found to be in the complainant's behaviour. This represents an antiquated view of women and their participation in the world. It also perpetrates the myth that women who engage in particular behaviour, such as being out at night and drinking, puts them at risk and makes themselves vulnerable to sexual assault or, worse, freely available for sexual activity.*

In this research, complainant behaviour was more commonly relied on to draw inferences about the fact of consent, or that the defendant had reasonable grounds to believe she was consenting.<sup>60</sup> However, in a number of cases the complainant was directly asked if she felt responsible for what happened to her, either as a consequence of inviting the defendant into her house or her bed, or as a consequence of making a decision to drink/get drunk. The following examples are from one case in the principal research and one case in the pilot study:

**Q:** *So I come back to a question that I asked you yesterday, do you feel any sense of responsibility whatsoever for allowing yourself to get drunk where you say you don't know what you were doing or what you were saying, do you feel any sense of personal responsibility for allowing yourself to get into that situation?*

**A:** *No.*

**Q:** *You don't, okay.*

**A:** *I'm not responsible for his actions.*

**Q:** *No, well I'm talking about your actions.*

**A:** *What were my actions, sir?*

<sup>56</sup> Chapter Six at [220](#) and Chapter Nine at [405](#).

<sup>57</sup> [Walters](#) at [371](#); [Carter](#) at [213](#).

<sup>58</sup> [Masters](#) at [287](#).

<sup>59</sup> New South Wales Department for Women *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (1996) at 177.

<sup>60</sup> See further Chapter Six at [237](#).

Q: *To get drunk so that you were, you damaged property at his place, you drove while disqualified, over the limit, and you ended up in a work colleague's bed?*

A: *Where I should have stayed by myself, sir. (determined) I should have been in there by myself. (starts crying, tissues) (Yamada)*

...

Q: *From what you say in the DVD the next day you complained to [your friend] didn't you?*

A: *Yep.*

Q: *But did you tell her you really didn't want to take it any further, just to let it lie sort of thing, those are my words?*

A: *Um, yep, I went into the room and I told her not to say anything 'cos I don't know, I just wanted to go home. (voice very shaky, sounds tearful, sniffs)*

Q: *Now I've got to put a proposition to you and you comment in any way, you feel free. It wasn't a situation where perhaps you were – got quite drunk and let yourself down and had consensual sex with him, was it?*

A: *Um, there's no way that I would do that, um – (voice very shaky)*

Q: *Okay, because of your [sexual] orientation that you're telling us about?*

A: *Well, yeah, I just wouldn't – I wouldn't do that, I'm – I wouldn't just meet somebody and do that. (voice very shaky, tearful) (Kato)*

We do not consider that suggesting to the complainant that she has contributed to the offending, or the events at issue, by making decisions that have made her physically accessible or vulnerable is acceptable questioning practice. While these examples were relatively uncommon in this research, we believe they are unacceptable and “improper”. We do not believe that is a difficult line to draw between questioning the inferences that a defendant might reasonably draw from a complainant's behaviour, and suggesting that responsibility for the (unwanted, from the complainant's perspective) outcome should be laid at the complainant's feet because she chose to attend a social function and enjoy some drinks. We note the response of Sir John Gillen to the reliance on such an inference, stated in the context of considering rape myths:<sup>61</sup>

*[V]ictims who drink alcohol or use drugs are asking to be raped, a concept so exquisitely vacuous that those who cling to it ought to hang their heads in shame.*

61 Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1 (Department of Justice, 2019) <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf> at 14.

### Lengthy and repetitive questions in reliance on the duty to put the defendant's case

The last category of examples of questioning which resulted in heightened emotionality for some complainants was when the subject of long periods of questions was the defendant's version of events. Sometimes distress occurred because of the unpalatable (in the complainant's view) nature of what the defendant claimed she had done:

Q: *And Ms Paulin you were lying on your side and you moved to assist Mr Jackson to be able to have sex with you?*

A: *(no audible answer) (long pause)*

Q: *We need an answer please Ms Paulin.*

A: *No. (raised voice)*

Q: *And at this point you asked Mr Jackson –*  
*(complainant starts sobbing)*

JUDGE: *I think there will be a few more questions that you will find disagreeable Ms Paulin. Do you want a bit of a break now or can you carry on?*  
*(complainant sniffs, blows nose, breathes out)*

DEFENCE: *I'll just ask my question again, are you ready? Thank you. Now, at this point you talked to Mr Jackson asking his name and did he have any diseases, remember that?*

A: *No ...*

Q: *And during you having sexual intercourse with Mr Jackson you talked to him about a threesome didn't you?*

A: *No. (incredulous laugh)*

Q: *Also talked to him about anal sex didn't you Ms Paulin?*

A: *(no audible answer) (sobbing)*

Q: *You talked to him about anal sex and you told him to spit on your arse and put his penis in, correct?*

A: *(pause, crying) No.*

Q: *And as my learned friend read out to you, you told him you were going to come and you asked him if he liked it, correct?*

A: *(crying, sobbing)*

JUDGE: *Witness is shaking her head. You need to give an oral answer when you're ready.*  
*(complainant long pause – crying, nose blowing)*

In this case the complainant had already been asked during examination-in-chief to respond to the substance of what the defendant had said to the police:



Q: Yasmin, Mr Jackson was spoken to by the police following the investigation. Are you aware of the detail of what he said to the police?

A: To some extent yes.

Q: And what's that?

A: That it was consensual.

Q: I'm just going to read to you what Mr Jackson said to the police and I'm going to ask you to respond. He said: "I did have consensual sex with Yasmin Paulin, both vaginal and anal and Yasmin consented to all of our sexual acts together. I'm sure she was consenting by what she said and did which included playing with my penis and her holding my hand down her pants. She also told me to spit on her arse and put it up her arse. She then told me she was going to come and moaned loudly." What do you say about that?

A: I think that's disgusting and I would never say that.

JUDGE: Well there were quite a lot of things attributed to you there. Do you recall saying or doing any of the things that he has mentioned?

A: No, I don't.

Q: Is it possible that you did them and because you were intoxicated couldn't recall having done so?

A: Yes, but I've never done that before in my life so I would not have done that in my intoxicated state.

CROWN: When you say "I haven't done that in my life", what are you referring to there?

A: Just all the things that were said that I just – that wouldn't even come out of my mouth even in a relationship with a person, I just wouldn't say that kind of stuff.

Q: Do you have any memory or did you play with his penis or hold his hand down your pants?

A: I have no memory of me holding his hand down my pants at all and no memory of me even touching his penis, no.

Given that this interchange had already occurred, that the complainant said she had no memory of doing any of those things and said she could not believe she would have, it is unclear why these matters needed to be traversed again in cross-examination, especially when it became apparent that the questions were very distressing to the complainant. The defendant's statement had already been put to the complainant, and it would have already been clear that she did not accept that she did or said the things he alleged.<sup>62</sup>

62 See *Solomon v R* [2019] NZCA 616 at [40].

While putting aspects of the defence case can cause the complainant to get upset because of the particular content, complainants can also become frustrated and distressed at repeated questions on the same matters – and such repetition is not always controlled or limited by the trial judge. This point is considered further below.<sup>63</sup> However, even in cases where the questioning did not result in obvious heightened emotionality, we noticed that lengthy and unnecessary cross-examination was permitted to continue, presumably on the basis that it was relevant to the assessment of the complainant's credibility.

In *Harris*, for example, the defendant's version of events was that the sex was consensual, and, as part of their sexual encounter, they used the complainant's sex toys that Megan kept in her bedside drawer. Megan said this did not happen and that they did not use her sex toys. In cross-examination a line of questioning is focussed on how then did the defendant know what was in the drawer?

Q: *Ms Boyd, do you recall being evidentially interviewed by the police in about [month] of last year?*

A: *Yes, I do.*

Q: *Why at that time did you not tell the police about the drawer that had sex toys and cream and lubrication in it?*

A: *Because at that stage I didn't remember that part.*

Q: *But you'd had until the previous [month], a good six months, to think about what had happened to you that night, hadn't you?*

A: *Yes.*

Q: *There you go. So why, you were trying to explain to the police at the time why you were on that side of the bed, weren't you?*

A: *Yes.*

Q: *Ok. You said you must have leant across the bed to get something, or you've gone around to the side of the bed and he'd followed you? Correct? You recollected that you'd gone around to the side of the bed to get something?*

A: *I think I did say something like that, yes.*

Q: *Ok. So, you remembered that you were going around to the side of the bed, why didn't you tell the police that in that drawer there were these sex toys?*

A: *Because I didn't see the relevance at the time.*

...

Q: *Why did you not remember about the sex toys being in that drawer next to that side of the bed?*

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63 At 361.

- A: *(long pause)* I'm sorry?
- Q: *Is that something that you just don't want to remember?*
- A: *No, I know they're there, but we didn't – as I said earlier, I don't use them with my partners, so therefore I didn't see the relevance.*
- Q: *The reason I'm asking you that Ms Boyd, is that because when he was interviewed in [month] by the police, right – Mr Harris told him that, "We had sex for hours in the lounge and then we had sex in her bed with her toys, 'cos she got toys out." No?*
- A: *No.*
- Q: *So how would he know that there were toys in that drawer if you hadn't opened it and got those toys out?*
- A: *I have no idea.*
- Q: *Okay, because he said that you had a thing called a butt plug, you have one of those things, don't you?*
- A: *No, I don't.*
- Q: *Because he said you put it in your bum and "She was putting them in her pussy, and I mean there was a box of f-ing toys there". There was more than one sex toy in that drawer, wasn't there?*
- A: *Two vibrators, yes.*
- Q: *Okay, and lubrication?*
- A: *Yes, and condoms.*
- Q: *And cream.*
- A: *Condoms.*
- Q: *And Mr Harris explained to the police that he saw all of those and that before you began the anal sex in the bedroom, that you had shown him those toys and you'd used one of them to loosen your anus.*
- A: *No.*
- Q: *But you were asked twice by the police, weren't you, about exactly how it happened on that side of the bed, hadn't you, weren't you?*
- A: *Yes.*
- Q: *And twice you said, "Well my recollections about why I was on that side of the bed are very vague", didn't you?*
- A: *I do remember saying to the police, "I can't remember why I was down that side of the bed. I may have gone to check my cell phone which was on the charger beside the bed."*
- Q: *Then today, wasn't it, you said that you'd thought that the drawer was open?*
- A: *Yes.*
- ...

- Q: *Ok. So, if it is what Mr Harris said is correct, that is that you introduced him to the toys and you used them on yourself before the sex in the bedroom, that would suggest that really that sex session in the bedroom was consensual wasn't it?*
- A: *No.*
- Q: *Ok. You don't want to think of that as being consensual now, do you?*
- A: *It wasn't consensual.*
- Q: *Ok. You don't even want to think that you introduced the sex toys to the session?*
- A: *I did not introduce the toys.*
- Q: *Well he says that you did, and he knows that you had those toys in that drawer, he describes them to the police. So how would he know that if you hadn't opened the drawers and introduced it into the sex session?*
- A: *I don't know, I don't know. (big breath in and out)*

The relevance of this cross-examination appears to be two-fold. First, that the use of sex toys indicated consent to the anal sex (which she denies); second, alternatively, as Megan denies that the sex toys were used, the defendant's knowledge of the sex toys supports his version of events and consequently undermines her credibility. While there is some legitimacy to both purposes, we consider that this amount of questioning, which allowed much irrelevant detail about the *contents of the drawer* to be offered as evidence, went beyond what was necessary to make the point. We consider that the entire middle portion of the cross-examination, including such detail, was unnecessary.<sup>64</sup>

### ***Control of complicated, compound, repetitive or improper questions: section 85***

The operation of section 85 in the specific context of cases involving allegations of sexual and family violence was the subject of consideration by the Law Commission in a recent Issues Paper and then in the Report on the second review of the Evidence Act 2006.<sup>65</sup> The Law Commission expressed the view that “it is insufficient for a judge to be *permitted* to intervene. If a judge decides, in accordance with section 85, that a question is unacceptable, they should be *required* to intervene.”<sup>66</sup> The Commission proposed an amendment, which

<sup>64</sup> We are also of the view that the evidence about her possession and use of sex toys should have been subject to a section 44 analysis: see Chapter Five at 136.

<sup>65</sup> New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018); New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

<sup>66</sup> New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [10.30] (emphasis in original). However, even in its “permissive” form, section 85 had been interpreted as imposing a duty on judges to intervene: see *Metu v R* [2016] NZCA 124 at [18], citing *Tahere v R* [2013] NZCA 86 at [28]–[30].

would add a specific reference to the “vulnerability of the witness” in section 85(2)(a),<sup>67</sup> and introduce a mandatory requirement to disallow questions failing within section 85(1):

- (1) In any proceeding, if the Judge considers a question is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge **must** disallow the question or direct the witness not to answer it.

The Government accepted these recommendations and they form part of the Sexual Violence Legislation Bill 2019.<sup>68</sup> This approach follows a similar amendment to the Uniform Evidence Law in Australia,<sup>69</sup> because of the view that vulnerable witnesses continued to be exposed to improper questions. Exercise of the previous discretionary rather than mandatory power was “patchy and inconsistent” and “seldom invoked by judges”.<sup>70</sup> Anna Carline and Patricia Easteal report that there has been little research so far on how a mandatory judicial intervention provision is working in practice. One study, in which a small sample of New South Wales barristers were interviewed, found that section 41, which now mandates judicial intervention in child sexual assault cases in that jurisdiction, had not resulted in an increase in the number of times the section was invoked.<sup>71</sup> The authors of *Mahoney on Evidence* believe that the proposed amendment to section 85(1) will also not change the law, given that judges are already under a duty to intervene, but state the reform “may assist in addressing judicial reluctance to ‘descend into the arena’”.<sup>72</sup>

This research will provide a point of comparison for any later study which examines the extent to which a mandatory requirement to intervene has been relied on in adult rape cases. Consistent with the Australian research, judicial intervention in questioning was infrequent in the 30 cases in the principal research. Intervention in cross-examination by the trial judge on his or her own initiative (not in response to prosecution objection) in reliance on section 85 (based on an analysis of the nature of the intervention) occurred in 13 out of 30 cases (43%). This compares to intervention in eight out of 10 cases (80%) in the pilot study. Of significance

67 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [10.34].

68 Clause 9 – see also *Proactive Release – Improving the justice response to victims of sexual violence* at [46] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>

69 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [10.33] (the amendment to the UEL took effect on 1 January 2009).

70 Anna Carline and Patricia Easteal *Shades of Grey: Domestic and Sexual Violence Against Women* (Routledge, London, 2014) at 192.

71 See Russell Boyd and Anthony Hopkins “Drawing the Line between Acceptable and Unacceptable Cross-Examination of Child Sexual Assault Complainants: Concerns about the Application of section 41 of the Evidence Act” (2010) 34 *Criminal Law Journal* 149 at 162.

72 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV85.04]. See also *Metu v R* [2016] NZCA 124 at [18].

are the number of interventions in each case. In all but two cases of those in the principal research, there were three or fewer interventions. In the two cases in which there were multiple interventions, one case had 11 interventions, and in the other, a case in which an interpreter was used, there were 16 interventions.

While “counting” interventions of itself may be equivocal as a research exercise, given that an absence of interventions may equally be consistent with a lack of need to intervene, there remains a marked difference between the principal research and the pilot study, as also noted by the Acting Chief District Court Judge.<sup>73</sup> Given the similarities in the fact patterns, issues at trial and focus of the cross-examinations as between the cases in the principal research and those in the pilot study, we consider that at least some of the disparity must be explained by the emphasis placed on judicial control in the Sexual Violence Court Pilot.

Case name (principal research)	Number of interventions (section 85)	Case name (pilot study)	Number of interventions (section 85)
<u>Buchner</u>	1	<u>Cropp</u>	5
<u>Depak</u>	2	<u>Junn</u>	4
<u>Edwards</u>	11	<u>Lino</u>	1
<u>Jackson</u>	2	<u>Lowrie</u>	10
<u>Jacobs</u>	2	<u>Salah</u>	1
<u>Langley</u>	2	<u>Sarkisian</u>	4
<u>Moss</u>	3	<u>Satae</u>	2
<u>Nash</u>	2	<u>Waititi</u>	6
<u>Patel</u>	1		
<u>Perez</u>	16		
<u>Roberts</u>	3		
<u>Simon</u>	2		
<u>Yamada</u>	3		

73 Judge John Walker: “Judges are more alert to unacceptable questioning and intervene more frequently”: <http://www.districtcourts.govt.nz/media-information/media-releases/14-august-2019/> at 2.

However, while there is increased use of section 85 interventions in the Pilot cases,<sup>74</sup> the **type** of interventions was the same as in the principal research. While section 85 specifically refers to the need to take into account the “nature of the proceeding” when determining whether a question (or line of questions) is “improper”, this reference, which was intended to refer primarily to sexual cases,<sup>75</sup> has not resulted in curtailing the type of questions we would consider to be improper (see the examples discussed above).<sup>76</sup> The types of section 85 interventions that are most common relate to a request to: break down, shorten or simplify the question; use different/not colloquial words; refrain from starting or ending questions with “do you remember” or “do you recall” (an intervention noticeably more common in the Pilot cases); let the witness answer the question; and avoid repetition. In other words, the focus is on fairness in terms of witness comprehension (that is question type), rather than on the improper **content** of the question.<sup>77</sup>

### Specific examples of intervention under section 85

Intervening to require restating of a question that starts with “do you remember?”, has traditionally been considered appropriate.<sup>78</sup> In a recent appeal from a Pilot case,<sup>79</sup> the Court of Appeal noted that the “sheer number of interruptions, particularly given the relatively short cross-examination, has made the Judge susceptible to the criticism he intervened too readily”. The Court concluded, however, that the jury would have been left with the overall impression that the judge was focussed on “achieving clarity and fairness for all parties, including counsel, the complainant and the jury.”<sup>80</sup> The Court specifically referred to an example of the judge’s request that a question starting with “do you remember?” be reworded:<sup>81</sup>

74 The Ministry of Justice *Sexual Violence Court Pilot: Guidelines for Best Practice* (2017) state (at [23]): “The judge must be alert to and intervene if questioning of any witness, particularly complainants, is unacceptable in terms of section 85 of the Evidence Act 2006”.

75 See for example New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at [C37].

76 See for example at [346](#) and [370](#).

77 Questions that are “improper” because they are poorly framed, so that they are unclear or misleading, are usually identified and re-worded – however attention to these kind of improper questions “does little to effect the *substance* of what is being asked – counsel can simply reword a question or ask a series of less linguistically complex directions directed at achieving the same result”: Russell Boyd and Anthony Hopkins “Cross-examination of child sexual assault complainants: Concerns about the application of s 41 of the Evidence Act” (2010) 34 *Criminal Law Journal* 149 at 163.

78 *R v Josephs* 26/2/02, CA349/01 at [16].

79 Not one of our research cases: *B (CA182/2018) v R* [2019] NZCA 18. See also *Singh v R* [2019] NZCA 258 at [17].

80 *B (CA182/2018) v R* [2019] NZCA 18 at [53].

81 At [38].

*[Defence counsel] asked the complainant if she could remember a time when her older brother damaged [the defendant's] car. She said "no". The Judge intervened to point out that a question prefaced with the words "Do you remember ..." is likely to produce an ambiguous response. [Defence counsel] reframed his question. He told the complainant B would give evidence that such an incident had happened and asked her whether she could remember it. In our view there can be no criticism of this intervention. The initial question and answer were capable of different interpretations; first, whether the complainant remembered such an event or secondly, whether such an event had, in fact, occurred. The intervention was to avoid the potential for that ambiguity.*

In *Perez*, a case from the principal research, which involved the use of an interpreter, the judge made similar points to defence counsel about the ambiguity (and therefore unfairness) of asking a question which included the phrase "do you recall?":

Q: *And then after some discussion about a DVD, the two of you started kissing on the couch?*

A: *No, I told him first that I wanted to go back to [suburb].*

Q: *When you were kissing, did you actually sit on his lap facing him, do you recall doing that?*

A: *Can't remember.*

JUDGE: *[Defence counsel] the form of that question was unhelpful. You put a proposition and then you end the question by saying do you recall that. Well that begs exactly the sort of answer that you got; an unhelpful one.*

DEFENCE: *Yes Sir, I'll reword it.*

Q: *During the kissing, do you recall –*

JUDGE: *Don't say do you recall. Just did xyz happen?*

DEFENCE: *Did you sit on his lap facing him?*

...

Q: *You've mentioned a discussion with your sister that you had in the bedroom. Do you recall that?*

JUDGE: *Do you recall mentioning it or do you recall having the conversation? That's where the, "Do you recall's" gets you into trouble [defence counsel].*

DEFENCE: *Certainly, Sir.*

Q: *Do you recall giving evidence yesterday about making a call to your sister from the bedroom?*

A: *Yes.*

Q: *So, at this point, when you made the call you were away from Mr Perez, is that right?*



- A: Correct.
- Q: And you told us yesterday that you spoke with your sister, is that right?
- A: Yes, yes, I spoke to my sister.
- Q: Did you think of telling your sister about what had happened with Mr Perez?
- A: No, I didn't think, I was too embarrassed, I didn't want to talk about anything to her.
- Q: Are you sure that you spoke with your sister?
- A: Yes.
- Q: Do you recall mentioning to the police that you didn't speak with your sister but that a chef answered the call?
- A: No. I spoke to my sister. (*Perez*)

The judge interrupted counsel four times to instruct them to refrain from saying "do you recall?"; nevertheless, the phrase was used a total of 52 times by defence counsel in this case.

While we observed much repetition of lines of questioning that was not commented on by the prosecutor or the judge (including in four of the Pilot cases), there were judges and prosecutors in the pilot study who did intervene on the basis of unnecessary repetition, and sometimes this had the effect of controlling inappropriate **content**:

- Q: You both started kissing in bed when he got into it?
- A: I don't recall doing so, no.
- Q: Sorry what was that, you don't recall?
- A: I don't – no.
- Q: And you played with his penis on top of his jeans?
- A: I do not recall doing that, no.
- Q: And that was the point which he put his fingers in you, wasn't it?
- A: Given that I don't recall the previous events it's difficult to say.
- Q: So, don't recall kissing, don't recall playing with his penis and don't recall him –
- JUDGE: You've just asked those questions [defence counsel], I don't want you to ask them again, and I won't let you. There's things that ought to have been covered earlier when you were going over this material.
- DEFENCE: I'm putting my case Sir, now ...
- JUDGE: Yes, well, it could have been done earlier, rather than being repeated again.
- DEFENCE: Am I allowed to put it sir, my case?
- JUDGE: Well, you put your case. But it ought to have been put when you were covering all this detail with the witness. So, press on.

Despite a follow-up discussion in the absence of the jury about the need to avoid repetition, even when the claim is that the questions are necessary to put the cases (rejected by the judge), counsel again repeated these questions when court resumed the next day.

In *Junn*, Crown counsel objected to a repetitive line of cross-examination, in a case involving the assistance of an interpreter for the complainant, and defence counsel submitted that it was a necessary aspect of his duty to put the case:

**CROWN:** *Objection, Your Honour. I'm objecting on the grounds that the witness has said on a number of occasions that she doesn't remember the intercourse. So, in those circumstances, the witness can't possibly answer the question, whether the intercourse occurred when most of the others were out of the room.*

**JUDGE:** *Or for that matter, it was ten minutes later.*

**CROWN:** *Or it was ten minutes later. And she did in fact deny that she, yeah. So my objection is based on the fact that the witness has said on numerous occasions she doesn't remember the intercourse, so therefore putting questions to her with reference to the intercourse, is not fair.*

**DEFENCE:** *As this objection has been taken in front of the jury, I need to explain that I have an obligation to put the case on behalf of Mr Junn.*

**JUDGE:** *I suspected that was probably the case.*

**DEFENCE:** *But I'm actually happy to move on, as long as the jury understand that I have an obligation to put the case.*

**JUDGE:** *Can I just clarify, [defence counsel], I take it you're saying that evidence is likely to be given that will be the state of the play. That is, that others have left the room. If that's the case then perhaps you could put it in that way, acknowledging of course that she says she doesn't remember it, but see if she has any comment to make on that proposition.*

In *Sarkisian* it was the prosecutor who first objected to the repetitive nature of the questioning of the complainant, Katrina, regarding a gap in her memory of the events preceding the alleged rape:

**CROWN:** *Your Honour, sorry, I just feel like there's quite a lot of repetitive questioning here, I think the witness has very clearly answered that twice now.*

**JUDGE:** *Yes, yes, there is. Well, defence counsel, ask the question, but it has been asked.*

**DEFENCE:** *Well, Sir, I just want to make it sure that the jury is clear on this.*

**JUDGE:** *No, no, it's not a matter of accuracy at this stage, it's a matter of questioning. So, ask the question.*

**DEFENCE:** *At some point after this photograph then, you don't have any memory of how you went to bed, right?*

**A:** *That's right.*

Q: *And the next memory you have is, you say is waking up with Mary over you, is that right?*

A: *That's right.*

Q: *Right. So that point you can't tell us in that memory blank period what happened or what didn't happen because you just don't know, right?*

A: *That's right.*

Q: *Alright. So, you can't tell us what room you went into?*

A: *No.*

Q: *You can't tell us how you got into the spare room we've seen in the pictures?*

JUDGE: *[Defence counsel], hasn't this question just been asked and answered? So rather than a list of things that can't be remembered during this period, the witness has told us she can't remember anything over this blank period.*

DEFENCE: *I understand what you're saying Sir. I suppose there's been evidence led on, on some of these things, so I just want to make it clear that she has no memory, that what she has memories of and what she doesn't ...*

JUDGE: *Well, well, she's told you. None.*

DEFENCE: *Is Your Honour stopping me from this line of questioning?*

JUDGE: *Well, do you want to ask a single question, or a compound question?*

DEFENCE: *I'll get through it quick, Sir.*

The following day, the judge intervened in the cross-examination on two occasions, during the questioning on what Katrina had allegedly said in a downstairs bedroom, as inconsistent with the statement of another witness. In this example, the judge was also concerned about the questions that were assuming a fact contrary to the witness' earlier answer:

JUDGE: *No, no, the witness has said –*

DEFENCE: *No, not in the bedroom –*

JUDGE: *No, the witness has given you an answer, that it wasn't said in the room. So, it's not fair to ask a question loaded in that way saying "and you repeated that later".*

DEFENCE: *I've got to set a foundation, and then I've got to –*

JUDGE: *No, no, [counsel], you've set the foundation, you've asked the question repeatedly, you've repeatedly got the answer. So, it's not fair to ask a question now that is loaded in that way. I won't allow the question in that form.*

DEFENCE: *Right. Ok. Next question then. When you went upstairs then, did you, did you say again in front of other people upstairs that, "I'd better not lose my man over this"?*

JUDGE: *No [defence counsel], that's the same question. It is loaded with, "did you say again". The witness has repeatedly told you she did not say that downstairs.*

In another Pilot case defence counsel expressed their concern, in the absence of the jury, about the extent of judicial intervention:

**JUDGE:** *[Defence counsel], you had finished your questioning. Your junior then put, I suggest, your client's brief to you, and you're now going over it. It is detail that ought to have been put earlier. We are now going over repetitive ground.*

**DEFENCE:** *I always put my case at the end.*

**JUDGE:** *I am not concerned how you always do it. I am concerned that you are cross-examining a young witness, and you are covering ground again, at the end of the day when she is quite plainly tired. It ought to have been done differently.*

**DEFENCE:** *Alright. I have this concern, Sir. The number of times that you are interrupting me during my cross-examination is of concern to me. That's the first thing. The second thing that I'm concerned about is the manner in which you do it. Now barking at me, like you have done, in front of the jury, does no benefit to my client, or me.*

**JUDGE:** *Nor does covering the ground that you are covering now, again, that you ought to have covered earlier. My concern is to get the truth from the witness in the fairest way possible. Now you have concerns with the way I am behaving. Take it up elsewhere. But how much more have you got to go, given you had virtually finished?*

The judge was of the view that there had been unnecessary repetition in the guise of putting the defendant's case (again) at the end. Despite making this point strongly, the cross-examination continued for another 20 minutes, including questions that had already been asked, with counsel saying they were just doing "a wrap-up".

In *Cropp*, a discussion concerning the nature of the questions being asked during cross-examination also occurred in the absence of the jury. In this Pilot case, the judge also referred to the need for defence counsel to change approach from what was traditionally done under the guise of "putting the case". The judge concluded the discussion by saying that going over the same ground "blow-by-blow-by-blow ... becomes abusive to the witness" and was therefore unfair and improper:

**JUDGE:** *[Defence counsel], I'm becoming concerned with your questions. Section 85 issue. You do have a duty to put the case for Mr Cropp, but when the initial premise is denied, you don't need to then go on and on and on with aspects that clearly have been denied already, because that does start to become abusive for the witness.*

**DEFENCE:** *Well that's what, with respect sir, Mr Cropp will give in his evidence.*

- JUDGE: And he may give his evidence of that, but it becomes abusive when you put questions to her, which the initial premise, is completely and utterly denied. And, therefore, the other questions cannot possibly be answered by her any differently.
- DEFENCE: Well Sir, thank you very much for indicating your view on that, because I know that there is, there are different views out there with respect to ...
- JUDGE: There are changing views on that out there.
- DEFENCE: ... different judiciary. And I know that other counsel from time to time over the years have been criticised later on down the track for not putting details to ...
- JUDGE: Well, that's why I'm telling you. To say that you will not be criticised if you don't, but I'll become concerned and I will intervene if you put, very sensitive matters to her that she cannot possibly answer in any other way, because she's already denied the initial premise. Because that just then becomes abusive.
- DEFENCE: In fact, that is my preference anyway, with respect Sir, because it doesn't really make too much sense if she goes, I cannot remember, and you continue ...
- JUDGE: If she can't remember, then there's no point carrying on with the other questions.
- DEFENCE: I didn't want to do that, because I didn't want to risk Mr Cropp's case being criticised, Sir.
- JUDGE: No, I appreciate why you're doing it. But in the sexual violence court, this is being looked at very closely now, much more so than it has been, counsel need to adapt to it. If you're in doubt, you should ask me for a ruling, whether you need to continue ...
- JUDGE: I'm really just having this gentle discussion with you so you know what my view is.
- DEFENCE: Thank you, Sir, I'm grateful.
- JUDGE: That, when she's clearly denied a premise, that you don't need to continue asking questions based on that premise when it's been denied.
- DEFENCE: Makes common sense to me, Sir.
- JUDGE: I'd accept a question saying well there's a lot more on that, that Mr Cropp will say, are saying that you can't comment on any of that, as a rounding, to make it clear that there is more that Mr Cropp will say. So, if she wants to change her answer then she's got the opportunity to change her answer. But you don't need to go through blow-by-blow-by-blow, otherwise it does become abusive to the witness.

In this case, the judge took the opportunity to make it clear what expectations they had for how the rest of the cross-examination would progress. This is not as prescriptive as occurred in *A (CA90/2017) v R*,<sup>82</sup> nor did it occur pre-trial as is the practice in some overseas jurisdictions,<sup>83</sup> particularly in relation to child complainants in cases involving allegations of sexual violence, but it demonstrates the judge does, and should, have the ability to make clear, and enforce, particular expectations about questioning practices.

### A focus on form rather than substance

This research establishes that outside of the Sexual Violence Court Pilot, there is little judicial intervention in the questioning of adult rape complainants in reliance on section 85 (which is of most significance in the context of cross-examination). In the Pilot cases, while there was evidence of increased judicial intervention, we noticed also some push-back from defence counsel and resistance to judicial guidance – with instructions to adapt questioning style and avoid the use of repetitive questions often ignored. Further, in no cases was there intervention to prevent continued lines of questions that we considered to be unnecessary and improper.

While judges do respond to complainant distress, which is the result of some unfair or improper questions, by offering a break, there was no discussion as to the appropriateness of the **content** of such questions. Accepting that such control might be difficult and potentially prejudicial during the course of a trial, this type of dynamic should be addressed as an aspect of training programmes, coupled with reinforcement of the appropriate scope and content of questioning as part of the case review process. The need for attention to the content of training programmes and pre-trial agreements is also indicated, we believe, by the low numbers of objections or interventions by Crown counsel in these cases.

### Intervention by the prosecutor

The following table is a record of prosecutor objections during cross-examination of the complainant, and does not include points in the trial where Crown counsel attend to trial process or complainant management issues more generally.<sup>84</sup>

82 [2017] NZCA 278, discussed at [384](#) below.

83 In particular England and Wales: New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018) at [9.95] ff, citing The Advocates Gateway: <https://www.theadvocatesgateway.org/>. See also a recent evaluation by Joyce Plotnikoff and Richard Woolfson *Falling short? A snapshot of young witness policy and practice* (Lexicon Limited, 2019). <https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf>

84 See Chapter Four at [76](#).

Case (principal research)	Interventions and type (n=total interventions)	Case (pilot study)	Interventions and type (n=total interventions)
<u>Depak</u>	Let witness answer = 1	<u>Cropp</u>	Unfair representation of the evidence = 1
<u>Devi</u>	Misleading; repetitive; unfair representation of evidence = 3	<u>Junn</u>	Repetitive = 2
<u>Edwards</u>	Speculative; repetitive; unclear question; reference to inadmissible evidence – hearsay = 4	<u>Lino</u>	Let witness answer (2); breakdown question; question needs clarifying (2) = 5
<u>Gamage</u>	Unfair representation of evidence; repetitive = 2	<u>Sarkisian</u>	Repetitive questions (2); not relevant = 3
<u>Harris</u>	Speculative; reference to inadmissible evidence – section 44 = 2		
<u>Jacobs</u>	Hypothetical question = 1		
<u>Kingsford</u>	Unfair representation of evidence = 2		
<u>Moss</u>	Unfair representation of evidence; reference to inadmissible evidence (2) – section 44 = 3		
<u>Perez</u>	Reference to inadmissible evidence – section 44 = 1		
<u>Yamada</u>	Not a question (2); repetitive (2); let witness answer (5); unfair representation of evidence (3); more than one question asked (3); not relevant (2); reference to inadmissible evidence – convictions (2) = 19		
<u>Young</u>	Unfair representation of evidence = 3		

Objections based on issues of admissibility or the form or content of the question asked, as well as requesting the complainant be given time to answer the question, occurred in 11 out of 30 cases in the principal research (36%) and in four out of 10 cases in the pilot study (40%).

Of note is that in two of the cases in which there was significantly higher judicial intervention (*Perez* and *Lowrie*), there was only one objection by Crown counsel.

The trend in both sets of cases is therefore of little intervention by Crown counsel, as well as low levels of instances of objections within the cases themselves, with the exception of the prosecutor in *Yamada*. However, as noted already in this chapter, and in the chapters dealing with matters of admissibility and consent, there are many times in the trials that we believe that Crown counsel could have intervened. The July 2019 *Solicitor-General's Guidelines for Prosecuting Sexual Violence* refers to the requirement for a prosecutor to intervene when a question falls within the scope of section 85 – which the *Guidelines* state “includes questions asked in an intimidating, hectoring or aggressively dismissive manner, or questions that are designed to humiliate the witness.”<sup>85</sup> We are aware of the resistance by prosecutors to not be overly active in this regard, on the basis of jury perception regarding performance of trial counsel. Given that this research indicates that prosecutors do not intervene when such questions are asked, it supports a move to more widespread pre-trial clarity (and, ideally, agreement) about both admissibility and procedural matters with regard to the particular case.

### **Belittling, mocking or insulting questions or manner; talking over the complainant**

As noted above, the current *Solicitor-General's Guidelines for Prosecuting Sexual Violence* state that questions “asked in an intimidating, hectoring or aggressively dismissive manner, or questions that are designed to humiliate the witness”, fall within section 85 of the Evidence Act 2006 and should be disallowed. Aside from the procedural and evidential strictures this rule imposes, there is also an overlaying ethical obligation set out in rule 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: “A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.”

In the principal research sample, there were several cases in which we believe defence counsel adopted an unnecessarily mocking and belittling manner and tone with the complainant – falling within the *Guidelines* category of being “designed to humiliate the witness”. For example, in *Masters* defence counsel on a number of occasions used language and tone that sounded arrogant and played out as a series of verbal put-downs, which were not remarked on by the prosecutor or the judge:

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85 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [12.2]. See also section 7 of the Victims' Rights Act 2002: “Any person who deals with a victim (for example, a judicial officer, lawyer, member of court staff, Police employee, probation officer, or member of the New Zealand Parole Board) should–  
(a) treat the victim with courtesy and compassion; and  
(b) respect the victim's dignity and privacy.”



- Q: *Well I'm just going to suggest to you, **young lady**, that it's a bit odd, isn't it, that a guy whom you say sexually offended against you and who you claim to have regarded as a result of that as a dick and an annoying person and also a bit weird as you've described earlier, that you would choose him to come to your rescue at 4 o'clock in the morning. Do you agree with me?*
- A: *I just wanted to give him a second chance, be friends and not be weird like that.*
- ...
- Q: *And when you got into your bedroom did you shut the door?*
- A: *I don't know.*
- Q: *And you both, well did you suggest that he should hop up on your bed?*
- A: *Yeah, we were both on top of the covers. We were just gonna watch a movie, as friends.*
- Q: ***As you do.***
- ...
- Q: *So, when he arrived at your house after you invited him to come over and watch a movie you greeted him when you were wearing leopard skin pants and a pink t-shirt, right?*
- A: *Yeah.*
- Q: *Did you have a brassiere on?*
- A: *Yes.*
- Q: *When did you take that off?*
- A: *I didn't take it off.*
- Q: *How did he suck your breasts if you had a brassiere on?*
- A: *He lifted it up.*
- Q: *Did he?*
- A: *Do you mean a bra?*
- Q: ***I will call it a brassiere if you do not mind.***
- A: *Okay.*
- Q: *You can call it a bra. All right?*

In what is clearly a very upsetting series of questions in the following extract from *Walters*, which occurs just after the complainant Chantel has asked to have a break and has been ignored, the defence counsel adopt a range of strategies to unsettle her further. The overall theme is that she was not raped otherwise why would she not tell someone straight away and cease contact with the defendant (reinforcement of rape myth). Counsel also talk over her, pressure her to reply promptly, emphasise her use of "cunt" in her text interchanges and

adopt what we heard as an unpleasant tone when referring to her in the second person (as “you”). In our view, while questions about her ongoing contact with the defendant and the content of those messages have some sufficient (although marginal) relevance to the issues at trial,<sup>86</sup> the tone and modus of the cross-examination was in our view intimidating and there should have been judicial intervention:

- Q: *Well that’s all right. And he goes, “Laugh, laugh out loud. Doing anything tonight?” he asks. Yes, you remember this?*
- A: *I guess. (sniffing, crying, can barely talk)*
- Q: *And then you say, “No, but if I leave the house Mum will not be happy”.*
- A: *Once again, I was trying to avoid him, I was trying to avoid all contact. (pleading tone)*
- Q: *Well you could have –*
- A: *And what I was responding to, I was wanting to, to like, say whatever he wanted to hear. (angry tone, crying)*
- Q: *You could have just blocked him, you know, all you young ones know all about this Facebook stuff, you could have just blocked him instantaneously. Gone to the cops, got them to do it, I don’t know, but you didn’t. The conversation carried on.*
- A: *I wasn’t thinking clearly. (crying)*
- Q: *Okay. So, “If I leave the house Mum will not be happy”. And he says, “Fair enough”. And then you say, “How are you?” And he said, “Not bad”. And then you say, “Ditto, smiley face”. (complainant sobbing) Right? All good, didn’t you? (no pause – counsel fast, pressuring) We need an answer for the machine, for the dictating machine.*
- A: *I was just saying whatever he wanted to hear. (crying yelling, very distressed) I was just, I wasn’t gonna, like, say anything that led onto anything. (having trouble breathing)*
- Q: *Okay, then it carries on the next day, he asks, “What are you doing tomorrow?” And your answer is, “[Cain]’s a cunt”. That’s what you say, don’t you?*
- A: *I guess. (breathing heavily)*
- Q: *Not he’s, not he’s a c[unt], Cain is. And then Heath says, “I know, what’s he done?” (using a light tone when referring to the defendant and nasty tone for the reference to her) And then you say something about, “He was stoned as fuck and he’s a complete fuckin c[unt]-brain” is what you say. So, you start moaning about, about Cain, not about him, not about Heath, don’t you?*
- A: *I guess. (hyperventilating)*

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86 See further Chapter Six at 212.

While there were no similar examples in the pilot study, in both sets of cases there were occasions in which the complainant's language choice (including swearing) was repeated by counsel, or the complainant was required to repeat the words in response to further questions. In a number of these scenarios, the language choice, and reinforcement of it, seemed unnecessary to make the relevant point, and in our view shamed or humiliated the complainant, or was done in order to encourage prejudicial inferences to be drawn about her – that is, she is a certain type of young woman who chooses to use unsavoury language. These examples are discussed in the next section.

### Reinforcement of complainant's language choice: prejudicial inferences

In keeping with the original aim of the research, our focus was on the impact of cross-examination – however, we noticed cases in which the prosecution reused and repeated the complainant's language choice to explain what happened. The repeated use of her words was sometimes accompanied by a condescending tone of voice:

Q: *When you were in the hands and knees position on the bed, what happened?*

A: *What happened, that's when he started having sex with me then.*

Q: *All right, what was he doing?*

A: *Um, having sex.*

Q: *Yep, but what sort of sex was he having?*

A: *Like, I've gotta get – oh, I was on my hands and knees my head was down to the pillow.*

Q: *But what was he –*

A: *And he was behind me.*

Q: *Yeah, it's important Ms Anae that we understand exactly what you are telling us and in order to understand we need you to explain, all right?*  
(patronising tone)

A: *Yeah.*

Q: *So, in the hands and knees position, what was it that Masood [Ahmed] was actually doing to you, can you explain?*

A: *He was rooting me from behind.*

Q: *And what do you mean by that, what part of him was touching what part of you?*

A: *From down the bottom.*

Q: *Yeah, so you know the names for parts of your body?*

A: *Um, vagina.*

Q: *Yeah, so what was happening with your vagina?*

A: *He had his (pause) cock inside there.*

Q: *And at the time that you were on your hands and knees, was that all that was happening?*

A: *Yes.*

...

Q: *And you've talked about having sex **and rooting** and now you've explained a bit more about that –*

A: *Yeah.*

Q: *How long did that go on for?*

A: *That went on for 15 minutes.*

Q: *What else was happening?*

A: *Then after that, he turned me around to put my, put me on my back.*

...

Q: *Okay, now can I just ask you, on your hands and knees when Masood was having sex with you **and rooting you like you've described**, what were you doing?*

A: *Like what was I doing, I was trying to tell him to stop and –*

Q: *What were you saying?*

A: *I was telling him to stop doing that to me. I was telling him to stop it.*

In our view, the words in bold did not need to form part of the later questions. Further, as discussed in Chapter Four, there should be pre-trial agreement about language choices, and, in appropriate cases, the use of section 9 statement to avoid the need for complainants to give evidence about penetration.<sup>87</sup> While we accept that it is good practice, especially with child complainants, to use the words for sex or body parts that the witness uses, we consider that in the context of adult rape cases, this can result in presenting an unflattering and potentially prejudicial picture of the complainant.

In *Langley* it was apparent that the complainant was embarrassed and reluctant to confirm (and certainly not say) the words she said to the police.<sup>88</sup> While the relevance of this part of the statement is unclear, it also appears unnecessarily shaming for defence counsel to use her phraseology in this part of the cross-examination:

87 Chapter Four at 92.

88 While this wording forms part of what she said to the police, our “hearing” of the complainant’s response to questions about this part of her complaint indicated she was unprepared and embarrassed to be asked about this as part of her evidence in court. See further Chapter Four at 98.

Q: *Could I ask you please to look at [page] of that video transcript at [line] please? Have you read that?*

A: *(very long pause) Yes.*

Q: *Now to be fair to you, this portion here on [page] is when you were being asked whether or not he'd ejaculated is that right?*

A: *Yes.*

Q: *Did you however tell the police during that conversation or interview that you didn't know or you weren't sure whether or not you came, that is whether you, or those were your words, you didn't know if you'd "cumed" or not?*

A: *(no audible answer)*

Q: *Well just start with, no doubt, well there may be an explanation but I just want to deal with the interview at the moment to make this easier. So, if you just read those words. Did you say to the police, "I don't know if I cumed or not?"*

A: *(no audible answer)*

JUDGE: *Is the question [defence counsel]: did you say those words?*

DEFENCE: *That is the question.*

JUDGE: *Do you understand the question? The question is just whether you said those words to the police? Do you remember saying those words to the police in that interview?*

A: *I don't remember. (quiet)*

Q: *I'm sorry you're going to have to speak up.*

A: *I don't remember.*

A similar point can be made about the following extract from the cross-examination from the Pilot case *Satae*. In this interchange, Annamaria was clearly resistant and unwilling to talk about the meaning of what she said to the police ("wetting it"). Again, it was difficult to see the relevance of exploring this aspect of her statement and requiring her to explain it as part of her evidence. An agreement about this aspect of her statement we suggest should have been reached pre-trial:

Q: *So, you say on [page] your EVI that Mr Satae was, in effect, rubbing your private parts, don't you, you say it on the top of the page?*

A: *Yes.*

Q: *See that?*

A: *Yes.*

Q: *Do you say this was happening when you woke up?*

A: *Yes.*

- Q: *And then you talk about if you – in your EVI you talk about, you thought that you must have been, I will just get it for you, one moment please. If you look at the bottom of [page], the top of [page] you say, “He was in a spooning position and wetting it,” what did you mean by “wetting it” at the top there?*
- A: *(no audible answer)*
- Q: *What do you mean when you’re saying it there Ms Casey?*
- A: *(long pause, heavy breath out, speaks quickly) By licking your hands, like putting saliva on it and then putting that on your, on the area.*
- Q: *On your private part, all right.*
- A: *Yes.*
- Q: *Is that something you actually saw him do?*
- A: *No, that’s why I said in there I’m guessing he would have done that.*

In *Sarkisian*, another Pilot case, much was made, as discussed earlier, of where and when the complainant, Katrina, said two separate phrases. On her evidence she said “what the fuck?” when she woke up with no underwear on. Later she said “I’m not gonna be losing my man over this”. The relevance of challenging her about which words she said when, as another witness recalled the phrases in a different order, seemingly related to her credibility, and counsel constructed many questions with “fuck” in them. Not only did Katrina dispute the defendant’s repeated claims about what she said and when, which frustrated, upset and angered her, the continued restatement of what she allegedly said, containing “fuck, fuck”, was unnecessary in our view, as it distracted from the purpose of the questioning and unfairly represented Katrina as a person who makes unflattering language choices:

- Q: *And what you started shouting out down in that room before you even came upstairs was, “Fuck, fuck, I better not lose my man over this shit”.*
- A: *No.*
- Q: *Isn’t that right?*
- A: *No, that’s incorrect. That was long after. That was long after the fighting had started. The comment that was – that comment that was made was because my husband and I started arguing around what had happened.*
- Q: *Well – sorry.*
- A: *– I said, “I’m not gonna be losing my man over this.” And I stick by that. I’m not going to lose my husband, the man that I love, over something that I never did. (sounds angry)*
- Q: *Well you don’t remember what you did, though, do you?*
- A: *I didn’t do anything, [defence counsel]. (assertive)*
- Q: *Now, just so I’m sure, I think I’m right about this, you said to this jury you were saying, “Fuck, fuck,” when you were putting on your – those shorts and the underwear –*

- A: No, I said, “What the fuck,” [defence counsel].
- Q: Right, what did you say in the bedroom? Were you saying anything like, “Fuck, fuck,” or not?
- A: I said, “What the fuck, what the fuck,” and that was in response to me waking up with no underwear on. *(shaky voice, sounds angry and upset)*
- Q: Okay, so you were saying in the bedroom, “What the fuck, what the fuck,” right?
- ...
- Q: When we finished off yesterday, I was asking you some questions about what you said in the bedroom downstairs, the one that you woke up in with Mary over the top of you, okay?
- A: Yes.
- Q: And I questioned you about what you said and your response was you said, “What the fuck?” You were saying, “What the fuck?”
- A: That’s right.
- Q: There was a little bit more than that said, though, wasn’t there? More than just, “What the fuck?”
- A: I recall waking up saying, “What the fuck, what the fuck,” and scrambling around for my clothing.
- Q: But there was a little bit more than that. Do you remember anything else about what you said on the end of, “What the fuck?”
- A: No, all I recall is, “What the fuck,” and possibly, “What the fuck has happened?”
- Q: Were you also saying at that point, “What the fuck,” or to put it more precisely, “Fuck, fuck, I better not lose my man over this”?
- A: No, that is incorrect, [defence counsel], at –
- Q: Are you sure about that?
- A: I am certain at that point and I –
- Q: Yes?
- A: I recall vividly that point and, “I will not lose my man over this,” was at the point that my husband actually left the premises with my daughter because damn right, [defence counsel], I was not gonna lose my husband over something I didn’t do. *(sounds upset)*
- Q: Mhm, you were saying it all through that night after the – in the bedroom and then following the bedroom.
- A: No, I’ve said to you, [defence counsel], that that portion of what was being said was not said at the time that I woke up. *(firm)*
- Q: You’re not trying to mislead this jury over that?

While we accept that a forcefully said swear word (especially by the complainant to the defendant to indicate lack of consent, for example), has some significance in a rape case, we are concerned that rather than such language being used just to indicate a clear reaction and rejection, it is replayed and repeated in a way that seems to discredit or undermine the complainant. In *Sarkisian*, for example, defence counsel's constant use of "fuck" in putting what Katrina said at various times to her we believe was unnecessary in order to make the point about competing versions of what she said after the alleged rape. Rather, this line of questioning, even leaving aside the repetitive and sometimes speculative nature of it (which the prosecutor and the judge do object to), is hectoring and dismissive and should have been controlled for content as well as form.

By contrast, in another Pilot case, the complainant was not required to say the actual words she said to the defendant, which we consider to be better practice (in the absence of an explanation as to significance of swear word choice):

Q: *What had happened to the blankets on your bed, can you describe the position they were in?*

A: *I don't normally make my bed so they were scrunched up in the corner as they would've been when I went to bed. I wasn't under my blankets when I remember waking up.*

Q: *When he was on the floor saying sorry, what did you say to him?*

A: *I wouldn't be able to recall the exact words but I was quite angry at the time, I think I would've used some swear words and just told him that I wanted him to get out of my house.*

In *Masters*, defence counsel created a nickname for the defendant ("Darryl the dick") based on the complainant's use of the phrase "bit of a dick" to describe him in her statement to the police. The repetition of the name, used to suggest that her version of what happened should be doubted as unrealistic or unlikely, is a form of mocking her, and we would say was designed to shame or humiliate her:

Q: *That's what you're saying, right? (pause) And you seriously mean this do you?*

A: *Yes. (quiet insistence)*

Q: *Do you? How did it feel to be sexually offended against that night in your bed by this man that you'd only seen a couple of times before and only once when you were sober?*

A: *Um, it was – it was a bit violating. (rising intonation)*

Q: *Right. And I suppose your whole attitude towards him would've changed?*

A: *Um, yeah (pause) I thought he was a bit of a (pause) dick.*

Q: *A dick, I think is what you – the description you used –*

A: *Yeah.*



Q: – in the interview. Mmm, a dick. So you would have come to know him as “**Darryl the dick**” right?

A: Um, (pause) – yeah if you want to put it that way. (unconvinced)

...

Q: Okay, so you had all the support in the world that you needed, didn’t you?

A: Um. Yeah but we were still all drinking and we were all still up.

Q: Well why did you need –

A: Hanging out –

Q: – **Darryl the dick** as you previously described him? Why did you need **Darryl the dick** to come and help you when you were already at home with your mates after 4 o’clock in the morning?

A: Well he’d apologised for the previous incident and, I’m a nice, kind person, I wanted to, I still wanted to be friends with him. He was friends with people that I knew.

...

Q: Was there a spare duvet or something?

A: Yeah there was a duvet but it didn’t have a cover on it and it was an old one.

Q: And so, you thought the best option in these circumstances would be to get into bed with **Darryl the dick**?

A: Um, I just wanted to sleep in my own bed, it’s my bed. I just wanted a good night sleep with a pillow.

Q: Was there anything to stop you from going getting a pillow off your bed and taking it into the spare room?

A: Um, no there was nothing stopping me. I just wanted to sleep in my bed with my duvet and my – my bed.

...

Q: Well Ms Gregory, when you went into your bed that night to sleep with **Darryl the dick**, you had another option, didn’t you, and that was to stay with Jacinta on the double mattress in the spare room?

A: Um, I didn’t hop into bed to sleep with Darryl, I just wanted to go to sleep in my bed.

Q: And you went to bed in your nightclothes that you had on when he first arrived at the address?

A: Yes.

Elaine Craig recounts the use of similar tactics (related to reinforcement of language choice) in a Canadian case, and we agree with her characterisation of such questioning as being unnecessary and demeaning:<sup>89</sup>

*Arguably, the tone, phrasing, and insinuations underlying these questions are problematic. In two of the three questions in which [defence counsel] uses the word “tit” he is not directly quoting from the text sent by the complainant to her sister. That a young woman uses a slang word in reference to her own sexual anatomy in a text sent to her sister does not give a legal professional licence to deploy it against her in cross-examination. [Defence counsel’s] repeated use of the word “tit” was unnecessary and arguably demeaning.*

### Questioning by the judge

In 17 out of 30 cases in the principal research (56%) and seven out of 10 cases in the pilot study (70%), the judge reworded a question or questions that counsel asked the complainant, for the purposes of clarity and comprehension. Notably this occurred 12 times in *Jackson* and eight times in *Junn*. In five cases in the principal research (16%) and four cases in the pilot study (40%), the judge asked a question or questions on a matter that the judge viewed as needing further clarification, or more evidence was seen as helpful or necessary on the point.<sup>90</sup> In our view, based on the material we had access to, all of these types of interventions were consistent with the role of the judge and an appropriate exercise of the controls and powers in sections 85 and 100 of the Evidence Act 2006.

In six cases in the principal research (20%) and one case in the pilot study (10%), the judge asked further questions of the complainant, after the conclusion of re-examination. While in all these cases an opportunity was provided for further questioning arising from the judge’s questions, in only one case (*Schuetzte*) did counsel ask further questions.

In two of these cases, however, one from the principal research, and one from the pilot study, the judge asked, in our view, unnecessarily repetitive questions following re-examination – on matters that had been the subject of questions in both examination-in-chief and cross-examination. While in *Jackson* the questioning period was only five minutes in length, in *Lino*, the judge questioned the complainant for a further 15 minutes. In both cases, the complainant appeared to find the questions, which focussed on her clothing and the likelihood of her feeling skin contact, difficult to answer, which we suggest would have been an uncomfortable position to be in of itself.

89 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 74.

90 This occurred most often in the Pilot case of *Lino*: 10 questions or series of questions.

There was no explanation in any of the material that we had access to as to why the judge in *Jackson* saw the need to ask the following further questions:

JUDGE: *Ms Paulin you told us that your clothing had been tampered with in the sense that your shorts and knickers had been pulled down when these things were happening to you, that's the position isn't it?*

A: *(no audible answer)*

Q: *And I think you told us also that you, you didn't recall how that came to come about, how your clothing was arranged in that way. When you were being touched about the legs and the bottom area before there was any sexual intercourse, was, were your pants down at that stage?*

A: *(no audible answer)*

Q: *Was that a touching skin on skin or over your clothing?*

A: *No, my clothes were still on.*

Q: *Your clothing was on at that stage?*

A: *(no audible answer)*

Q: *But touching you told us about at first, on your legs and that's where –*

A: *Yeah –*

Q: *Was that on your skin with your clothing down or was that over your clothes?*

A: *Well, my shorts were quite small, 'cos I had quite short shorts on.*

Q: *So when this touching, this first touching was happening, was that over your clothing or had your clothing been pulled down at that stage?*

A: *I don't remember.*

Q: *You can't recall?*

A: *No.*

In *Lino* however, the judge referred to the further questioning in the summing-up saying:

*[T]here is the possibility, which was part of the Crown case, that Terri was asleep when the sexual intercourse started and therefore was unable to give consent at the time when the penetration of her vagina happened, but as the defence counsel has said, that was a matter which I wanted some further evidence about from Terri and that is why I asked her as to her comments [in the EVI] about his penis rubbing against her backside and then pushing against and it then going into her vagina and the like, which, as defence counsel said, would be indicative that she was awake.*

While some of the questions cover this particular issue (was she aware of any pressure against her backside), we are unsure of the relevance of the judge's repeated questioning concerning the defendant's claim about her black G-string and bare buttocks, seemingly going to the

issue of whether she was conscious and capable of consenting. The need for this interchange is also unclear in that Terri had given evidence, following a question from the judge, not counsel, that she could not recall what kind of underwear she was wearing.<sup>91</sup>

**JUDGE:** *All right, and then you say, and I've referred to the passage on [page] of your transcript, that he's then behind you and you can feel his penis rubbing against your butt?*

**A:** *Yeah.*

**Q:** *And sliding it into your vagina. What Mason says about those events is that ... he's got up and gone to the toilet and when he's come back he says that you have lifted your dress up above your waist so that just your underwear is then exposed to where he was lying, your backside to him and that **you were wearing a G-string, a black G-string showing your naked, effectively naked buttocks to him** and that he has taken that as encouraging of you wanting him to have sex with you, what do you say about that?*

**A:** *I don't know how he would have seen that if I was sleeping under a blanket.*

**Q:** *Well put that to one side the blanket business because he might have lifted the blanket to get back under it but what he's saying is you lifted your skirt up so that you exposed then what was **your essentially naked backside, both buttocks, because you had a G-string on** and that he also says you were sort of pushing your butt out towards him as if wanting him to couple with you, what do you say to that?*

**A:** *Mhm.*

**Q:** *So just, can we deal with that in sequence, so he's saying you lifted your dress up over your waist, what do you say to that?*

**A:** *No, I didn't, well when you sleep with a skirt on and your moving around of course it's just gonna lift up by itself, I didn't purposely lift it up, so wasn't an invitation for him anyway.*

**Q:** *Okay, second point he says **you have got this black G-string on and that when he's come back you're exposing essentially your naked buttocks to him, other than the thong of the G-string**, have you any comment about that?*

**A:** *About my underwear?*

**Q:** *Yes.*

**A:** *Well what do you, what do you ...?*

91 Asked by the judge during cross-examination:

"Q: Terri, what sort of underwear were you wearing?

A: I can't remember.

Q: Are we talking briefs or a full set of pants or G-string or?

A: I don't remember."

- Q: *Well that's what he has said was the situation, do you have any comment about what Mason said in his DVD about that particular aspect of the events? He's saying that **you were wearing a G-string that when he came back he's greeted by your two buttocks and the thong effectively exposed to him when he gets on the mattress behind you again.***
- A: *(no audible answer)*
- Q: *Do you understand what he's saying, he's saying effectively you've given him an invitation to participate in sex with him by **exposing your backside, naked backside to him other than the thong covering your anus and part of your vagina.***
- A: *Mhm. Um, I was just sleeping and because I was wearing a skirt, the skirt can ride up when you're moving around, I didn't lift it for him.*

Terri also seemed uncomfortable and unsure about what the judge was asking her, given it is repetitive – even saying at one point “what do you ...?” There was no intervention from counsel during this questioning, nor any supplementary questions to follow. We consider this period of questioning was unnecessary and distressing, and coming from the judge would have been, we believe, a somewhat disturbing conclusion to her courtroom experience. Terri was 18 years old at the time of this Pilot trial.

### ***Summary of findings and some proposals***

This research has documented the points in the questioning process, in adult rape cases, which cause the most distress and other indicators of heightened emotionality for complainants. Significantly, while there are examples of judicial intervention in some of these moments, or lines of questioning, in the Pilot cases, in the majority of cases in both studies the **content** of the questions that cause distress is not seen as problematic. Judges, and some Crown counsel, are intervening or objecting when the **form** of the question is unclear or unfair, and in cases of repetition, but rarely is the impropriety (in terms of those questions which are “designed to humiliate” or are asking for information which is irrelevant) commented on or addressed. To the extent that these questions are unnecessary in terms of the duty to put the case and contribute to the re-traumatising effect of the trial process, we consider that there could be better use made of the rules of evidence and procedure that already exist.

In particular, we are aware of varying practices with regard to the leeway given in cross-examination for the purposes of fulfilling the duty to put the case. We consider that in the particular context of adult rape cases when the issue is consent, what is in contention will be usually be very clear pre-trial, and there could be tighter controls placed on the challenges to the complainant's version of events (such as reducing the need to put all of the details of

the defendant's competing claims). Aside from the appellate authority that emphasises that the rule is about fairness, there is also recent acceptance by the Court of Appeal that judges have the ability to require counsel to seek pre-approval of questions.

In *A (CA90/2017) v R*<sup>92</sup> was an appeal in a case involving allegations of sexual and violent offending by A against his former wife, K. The grounds of appeal were that the judge had wrongly directed defence counsel to advise his cross-examination in advance, as well as wrongly preventing the defence from fully cross-examining K.

K had failed to appear in court for what would have been her sixth day of giving evidence via audio-visual link (with cross-examination having taken 16 hours). She told the prosecutor the previous night that she did not want to continue. The trial judge then made a detailed ruling limiting the scope of further cross-examination (including regarding K's motive to lie and her delayed complaint) and recorded the fact that the prosecution had indicated that it would not take any issue under section 92 about any failure to put A's case to K in relation to specific allegations of sexual violation.<sup>93</sup>

In the ruling the judge went on to say that a defendant's right to put his case was not unfettered and had to be modified where a witness was vulnerable. He recorded that, in general, the manner and tone of the defence counsel's cross-examination had been polite and respectful but he had chosen to adopt a level of detail in cross-examination well beyond any strict requirements to put A's case. The Court of Appeal upheld the trial judge's approach, as well as confirming the requirement for counsel to advise cross-examination questions in advance:

[40] And lastly, we do not accept the submission that the jury might have drawn adverse inferences from the absence of cross-examination on certain topics. To the extent that they were aware of any omissions at all (which we doubt) the Crown did not take any section 92 point. It seems to us to be inconceivable that the jury would have done so of its own volition.

[41] In short, we are unpersuaded that there was any error by the Judge in deciding to circumscribe cross-examination as he did. In the circumstances we have outlined we consider the decision was wholly justified. He did so in a reasoned and principled way. This ground of appeal discloses no miscarriage risk.

92 [2017] NZCA 278 (application for leave to appeal declined: *A (SC80/2017) v R* [2017] NZSC 136).

93 At [20].

This case confirms that it is permissible for a judge to intervene in cross-examination, as well as requiring agreement as to scope and content of the questions, in sexual cases involving adult complainants, with an impact on section 92 and the Crown closing. Notably, the Court of Appeal expressly referred to both the importance of the defendant's right to offer an effective defence as well as the protective function of section 85 of the Evidence Act 2006.

We consider that there should be more pre-trial agreement about the scope and content of questioning in adult rape cases. The Law Commission consulted on the desirability of specifically legislating for the introduction and content of "ground rules" hearings,<sup>94</sup> concluding that no legislative amendment is necessary – noting that such a hearing is possible as part of an "enhanced case review hearing", and could include discussions about the most appropriate questioning process.<sup>95</sup> The evaluation of the practices of the Sexual Violence Court Pilot suggests that closer case management (Guideline 9) has had positive results in terms of pre-trial resolution of issues with consequential impact on the trial process.<sup>96</sup> We support these initiatives, and the wider implementation of such best practice models outside of the Pilot.

We are of the view that closer attention to the matters at issue in the pre-trial process, ideally by the judge who will conduct the trial, should also reduce the type of questioning that we have shown impacts on complainant distress, even in the absence of further legislative reform.<sup>97</sup> This process should also reduce, as it seems to have in the Pilot, the introduction of irrelevant evidence. Given the reluctance of judges to advise jurors to ignore such evidence, in order to risk emphasising it, pre-emptive management of the evidence appears the most likely way to effect reform. Clearly, there also needs to be profession-wide acceptance of such a change in approach. We noted that in some of the Pilot cases, judges encountered push-back from defence counsel when attempting to control the scope of future questioning. A change in approach to preparing for, and conducting, rape trials also needs to be implemented more consistently by the prosecution.

94 New Zealand Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006: He Puka Kaupapa* (NZLC IP42, 2018) Question 38 at 175.

95 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [10.43].

96 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 24.

97 Note the opinion of defence counsel in the context of the Pilot evaluation: "Variation in the way the cross-examination guidelines are applied can only be eliminated through legislating the cross-examination requirements more explicitly": Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 69.

Within this chapter, as elsewhere, we recommended the development and use of judicial directions. Specifically, with regard to the issues we observed in the context of questioning aimed at challenging the credibility of adult rape complainants, we consider that directions are needed on the meaning of inconsistencies and on aspects of human memory.<sup>98</sup>

Finally, we believe that a wider discussion within the legal profession about the ethics of defending rape cases, and in particular, what are “reasonable instructions” could helpfully occur.<sup>99</sup> This could happen as part of the development of the proposed training programmes.<sup>100</sup>

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98 See Recommendation 38 in Chapter Ten.

99 “A good start [as to what should happen next] would be the deconstruction of old narratives and familiar tropes. We need to embrace a meaningful ‘talk-fest’ ... I encourage more ... truth, authenticity, bravery and a willingness to open up and let go of existing power structures”: Nicola Manning “A defence lawyer at the Criminal Justice Summit” (2018) 922 LawTalk 62 at 63. See also Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019): “We can learn a much better way as defence advocates on dealing and tightening up and being better at what we do. We need workshops and try and help people cross-examine in a much more effective and efficient way. *We’ve got to come away from how it used to be 30 years ago and upskill and have consistency* (Defence counsel)” at 75; “I think as a defence bar we need to do some further work in relation to approach. Maybe we need to talk to the Law Society about running specific seminars on [cross-examination of complainants] (Defence counsel)” at 87.

100 *Proactive Release – Improving the justice response to victims of sexual violence* at [17] <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>



## CHAPTER NINE

## RAPE MYTHS: REINFORCEMENT AND RESISTANCE IN CLOSINGS AND JURY DIRECTIONS

### *Purpose and content of closing arguments and jury directions*

Once the questioning phase of the trial process is completed, prosecution and defence counsel have an opportunity to summarise their cases and present submissions to the jury. The judge then sums up for the jury, outlining the relevant law and giving directions about the use the jury can make of specific pieces of evidence. In this chapter, we examine the extent to which rape myths and other outdated tropes and stereotypes are relied on, or reinforced, when counsel close their cases to the jury. We also examine the extent to which reliance on rape mythology, and the “real rape” schema, is resisted by the prosecutor in closing argument or by the judge when summing up to the jury.

In order to do this, it is necessary to understand the structure of the end of the trial. When all of the evidence is concluded (which includes the cross-examination and any re-examination of witnesses), the prosecution may make a closing address (section 107(6) of the Criminal Procedure Act 2011). The defendant may then make a closing address (section 107(7) of the Criminal Procedure Act 2011). A closing address is the context in which the prosecution and defence present their cases to the jury, and suggest that certain inferences are compatible with the facts presented. They might comment on the evidence and issues and seek to point out inconsistencies or illogicalities in the opposing case. The closing statements may therefore include comment on any evidence which might be relevant (or said to be relevant) to the jury’s task of deciding on a verdict. However, our research did not involve access to the entirety of the evidence given in the trial. For this reason, we are not able to comment on whether the closing statements from both the prosecution and the defence were a fair and accurate representation of the evidence at trial.

While our focus was initially on reliance on rape mythology by defence counsel, we also found instances of the prosecution reinforcing erroneous assumptions about complainants when this potentially assisted the Crown case. These were primarily comments about the complainant’s demeanour, or more particularly her distress, immediately or shortly after the alleged rape, or about how immediate was her complaint, following the alleged rape.

In terms of **countering** rape myth, or unsupportable statements, the order of closings obviously means the prosecution’s ability to provide a counter-narrative is somewhat limited.

They are unable to respond directly to any comments made by the defence in the defence closing. However, in their own closing, a prosecutor is able to identify and respond to any claims they anticipate will be raised by defence counsel in closing, including those arising during cross-examination of the complainant (or other witnesses) or by any evidence offered by the defendant.<sup>1</sup> The prosecution should also raise any concerns arising from the defence closing with the judge and ask that the judge address the matters in the summing-up.<sup>2</sup>

Once the prosecution and defence have closed their cases to the jury, the judge will sum up the case to the jury (known as the summing-up). The function of summing up is to assist the jury in their task, by giving them an adequate direction on the law and the regard they are to have to particular evidence. The judge must also put before the jury the contentions or arguments of each side and summarise both the prosecution and defence cases in a balanced and clear way. There is a requirement for the judge to be balanced in his or her treatment of the opposing cases, but that does not mean that they cannot comment on the facts.<sup>3</sup> In almost all cases, the judge will present the jury with a question trail, a written aid that outlines the legal elements of the charges faced by the defendant to assist the jury in their deliberations.<sup>4</sup>

In general, our view is that judges could be more proactive in directing juries about rape myths, and we support the creation of further judicial directions in this area. Judicial directions are directions given by a judge to the jury to provide guidance about how to consider, and give weight to, the evidence, and to advise them about the limitations and risk of particular types of evidence.<sup>5</sup> The use of directions is intended to reduce the risk of

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- 1 However, the prosecutor must “never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack on the accused”. This does not mean, however, that a prosecutor has to be devoid of emotion, or is unable to argue their case forcefully. The Court of Appeal in *R v Hodges* considered that “the Crown should lay the facts dispassionately before the jury and present the case for the guilt of the accused clearly and analytically ... [Crown counsel] are entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs”: *R v Hodges* CA435/02, 19 August 2003, cited with approval in *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425.
  - 2 Counsel have an obligation to draw any problems with the summing-up to the judge’s attention immediately (by asking to speak to the judge in the absence of the jury): Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (Thomson Reuters, online) at [TP16.03] and the cases quoted there. We do not know the extent to which this occurred in the cases in this research as we did not have access to the audio of this part of the trial process.
  - 3 “The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other. A judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact. Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms. Inevitably these are ultimately matters of degree and judgment”: *R v Keremete* CA247/03, 23 October 2003 at [18] (citations omitted).
  - 4 See also Chapter Seven at [246](#).
  - 5 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.53].

illegitimate reasoning by jurors, and in the context of sexual violence, may be particularly useful to ensure jurors are not influenced by assumptions, prejudices or misunderstandings that the evidence might otherwise give rise to.<sup>6</sup>

The complainant is generally not present when closing statements are made and the case summed up to the jury by the judge. However, this does not diminish the importance of accurately summarising the evidence, and of challenging rape myths at this point in the trial process, given that the closings and the summing-up are the last statements the jury hear before going out to consider their verdict. There is also a broader concern about media reporting of trials. If closing statements reinforce rape mythology and media rely on those statements to summarise the content or themes of the trial when reporting, this process can perpetuate unhelpful stereotypes or reasoning.<sup>7</sup> As Elaine Craig notes, shaming individuals during the trial is only one way that reliance on rape mythology is harmful – it also contributes to a social context where fear of the legal system and its ability to respond to sexual assault means that “men can sexually violate women (and children) with almost complete legal impunity”. Further:<sup>8</sup>

*The criminal law and the justice system remain the state’s primary response to the social problem of sexual harm. That is unlikely to change in the near future. Women who testify against those who sexually assault them perform a role in what is a public legal process. It is important that all aspects of the state’s response to the serious problem of sexual violence do so from a neutral point of view, where outdated stereotypes are not perpetuated, and there are no insinuations of victim blaming.*

### **Rape mythology in closing statements and summings-up: why analysis matters**

We had access to transcribed versions of both the prosecution and defence closing statements and to the judges’ summings-up for all 30 of the cases in the principal research and all 10 Pilot cases. We also had access to the question trails from 25 cases in the principal research and from eight cases in the pilot study.

6 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.53].

7 See for example the report of the Media Council upholding a complaint about a news report that did not make it clear it was quoting from closing statements and not directly from the evidence and thereby misled readers: “Stuff rebuked over misleading court report” (8 May 2019) New Zealand Law Society <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/stuff-rebuked-over-misleading-court-report>. See also Nick Burcher “Decision highlights problems with court reporting” (2018) 921 LawTalk 51–56.

8 Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen’s University Press, Montreal, 2018) at 16.

Our research shows that reliance on rape myths and stereotypical beliefs about rape victims remains a staple in defence (and, on occasion, prosecution) closing statements. In many cases, defence counsel sought to make meaning of aspects of the complainant's behaviour in line with rape mythology, or relied on underlying (and erroneous) ideas about what "real rape" looks like. It is relatively rare to find examples of where judges "counter", or problematise, these submissions in summing up to the jury.

While some research indicates that jurors do not subscribe to rape myths, we consider that there may be a difference between a juror disavowing belief about a particular myth, in the abstract,<sup>9</sup> and being influenced by a persuasive argument that relies on the myth in a much more oblique manner. Trials are a series of stories or claims that are put forward for jurors to follow, and because reasonable doubt is (appropriately) a central part of trials, it is the use of misconceptions about women and rape to create an alternative, and compelling, story that is the primary concern in these cases. The difficulty lies in moving from the general, abstract point, where jurors may be able to clearly identify erroneous reasoning, to assessing the significance of such a myth in the specific case, and in particular, in the way it interacts with the evidence.<sup>10</sup>

*This explanation holds true for many of the most enlightened of jurors. We can reason only by stories, and absent the most careful intervention to substitute other tales, we are bound by the dominant cultural narratives. Thus, an educated white male may know that a woman's being sexily dressed does not mean she deserves to be raped and that "no" means "no." Yet, in a real case involving a real defendant's freedom, where the woman wore a low-cut dress and drank, and the accused says that she did consent and offers some motive for her lying, the motive seems plausible, the dress and drinking seem relevant, and the chances for miscommunication seem clear. Suddenly, perhaps reluctantly, the well-educated, progressive white male juror has a reasonable doubt. And he has the doubt not because he rejects feminist insights – he may even endorse many of them – but because he must first judge credibility and determine the "facts." The defendant's tale simply seems more plausible than the woman's precisely because the former matches cultural rape stories.*

9 Preliminary results from research undertaken by Professor Cheryl Thomas with real juries in England and Wales indicate that very few jurors believe the obvious myths and stereotypes, although on some topics there are substantial proportions of jurors who are "not sure" about these issues (see Sir Brian Leveson, President of the Queen's Bench Division "Criminal Trials: The Human Experience" (Faculty of Law, University College London, 13 June 2019) at [22]). While the research might indicate that the numbers of jurors who hold such beliefs is small, this does not necessarily mean that these beliefs will not have any influence on a trial. If a single juror holds even one of those views, they are in the position to influence other jury members, or to hold firm to their position in face of opposition. In addition, even where a juror may not believe an element of rape myth as an abstract principle, it does not mean that they will not be influenced by a narrative that has a rape myth as an implicit assumption. See also Vanessa E Munro "Judging Juries: The 'common sense' conundrum of prosecuting violence against women" (2019) 3 New Zealand Women's Law Journal Te Ano Kawe Kaupapa Ture a Ngā Wāhine 13 at 33–34.

10 Andrew E Taslitz *Rape and the Culture of the Courtroom* (New York University Press, New York, 1999) at 43.

A similar point is made by Louise Ellison and Vanessa Munro in their mock rape study. They argued that using mock juror analysis allowed them to listen to jurors talk about rape and their responses in the specific case, including spontaneous or visceral reactions to factors which might have a significant impact on the perceived credibility of rape allegations, like the behavioural or emotional reactions of victims.<sup>11</sup>

It is this subtle reliance on misconceptions to reframe the activities in question that remains stubbornly embedded in adversarial trial culture. Part of the difficulty in addressing such use is in drawing a line between permissible questioning, for example of a complainant's credibility or memory, and the impermissible slide into reliance on an idea of the way that women should behave. Obviously, defence counsel must be allowed to fearlessly defend their clients. However, there are ways of doing so that do not rely on misconception or outmoded ways of thinking. The difficulty arises particularly where defence counsel is challenging the credibility of the complainant (a legitimate role). However, where that crosses into an inference that a complainant's behaviour is generally indicative of consent, the submission may not be sufficiently grounded in the facts of the case.

### ***Scaffolding (or disrupting) juror reliance on rape mythology in the summing-up***

Before discussing the examples of the use of rape mythology in the two studies, we note that aspects of the current standard jury directions may actually operate to support, and perhaps encourage, juror reliance on rape myths and the “real rape” schema in their deliberations. In particular, we consider that the direction to jurors to use their “common sense” is particularly problematic in the context of rape trials – especially when it is now known that jurors may well believe highly contestable claims about victim behaviour on the grounds that they are oft-repeated and commonly-held. Given the acceptance of the helpfulness of “counter-intuitive” directions offered to provide an alternative explanation to that which might be “intuitive” or based on “common sense”, it seems problematic for the jury to concurrently be told to rely on their own world view. It is difficult to know what juries would make of counter-intuitive directions given alongside such an instruction.

We support the use of directions on how the jury should draw inferences from facts, and believe that the jury should always be told how to evaluate and use closing arguments. In the discussion that follows, we express preferences for the content of such instructions, which should include using examples from the actual case. We also consider the particular risks with relying on assessments of demeanour when assessing the credibility of a complainant in a rape case. Finally, we consider how the structure of a summing-up may assist in de-emphasising rape mythology.

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11 Louise Ellison and Vanessa E Munro “A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study” (2010) 13 New Criminal Law Review 781 at 799.

### Directions to the jury to rely on their “common sense”

In around two thirds of the summings-up in the cases in the principal research, there were references to the need for jurors to use their common sense, or knowledge of human nature, or knowledge of the world. We have particular concerns about this in the context of rape mythology, given that complainants may act in ways in which people might consider the antithesis of common sense or counter to general knowledge.

Every jury in the pilot study cases was told to use their common sense. Some of the examples were particularly problematic. One such direction was given in the Pilot case of *Lino*:

*Well, you have obviously followed closely what has been said, you use common sense, your experience of life, in making assessments to decide do you accept what the witnesses said about this fact, this fact, this fact and so forth, or do you have doubts about some of that, or all of it? How do you decide whether witnesses are being truthful or not? Well, you use the skills that [defence counsel] touched on, that you use in everyday life. When you think about it, when we talk to our friends or our children or when we watch one of our politicians on the network news, you normally look and watch them as they speak, you take into account the words they use, you use your experience of life to decide whether what they are saying adds up within itself when compared to other factors which you accept and whether it is what you would expect someone in those circumstances, at that station of life, to have experienced those sorts of things they are to be telling you and whether it is truthful or not?*

In the context of an area where complainants react in ways which are often the opposite of the way in which people might expect them to react, we consider there is some risk in asking jurors to use their own experience of life to decide whether what complainants have done is what the juror would expect them to do. In assessing mock jurors’ deliberation strategies, Ellison and Munro noted that many (female) jurors considered their own instinctive reactions to the alleged actions of the defendant would be “‘to poke his eyes out’ (Jury B), ‘pull his hair’ (Jury O), ‘scratch his face’ (Jury D) or ‘kick him in the bollocks’ (Jury K)”.<sup>12</sup> These reactions occurred despite a direction from the judge that there was no need to show evidence of any kind of struggle in order to establish that there was no consent.<sup>13</sup> In our view, there is even more of a risk of jurors resorting to their own personal experiences, or expectations of their own behaviour while faced with such a situation where the jury has been specifically instructed to do so, such as in the direction above. While the judge did remind the jury that the complainant and defendant were only 17 years old, at the beginning of their lives and

12 Louise Ellison and Vanessa E Munro “‘Telling tales’: exploring narratives of life and law within the (mock) jury room” (2015) 35 Legal Studies 201 at 218.

13 At 218.

experiences and, as common sense would tell you, do not always make the best decisions at the right time, we do not think this is enough to vitiate against the direction to jurors to use their own experiences to make sense of the story of the complainant (and the defendant). Our concern is that evidence of events, or complainant behaviours, which is often admitted in these cases is actually the opposite of what many jurors might consider to be expected.

A similar comment was made by the judge in *Satae*:<sup>14</sup>

***Test each witness' evidence against the yardstick of human nature or common sense. Does a witness have a good reason for saying what they did? Does it make sense? Is it consistent with the rest of the evidence that you do accept? Do other witnesses or other independent facts or documents [support] or confirm what a witness has told you? Did the witness make concessions when a concession was clearly called for?***

In our view, this comment has the tendency to encourage jurors to assess the complainant's behaviour according to the way the juror believes (consciously or otherwise) they should act. If the jury has been given specific warnings (for example a warning under section 127 that there can be good reasons for a complainant to delay making a complaint), being told to measure a witness' evidence against common sense may mean this warning is ignored, if it does not coincide with the juror's view of a common-sense analytical approach. If jurors believe that they would behave in a manner differently from the complainant, they may see the complainant's behaviour as going against common sense or human nature.

In *Satae*, the complainant, Annamarie, and her friend met the defendant Ligi in town and he offered to see them home. Once there, Ligi asked to stay the night as he had nowhere else to go. He was invited in and allowed to sleep in the lounge. Annamarie alleged she was woken by Ligi raping her, while Ligi said they had consensual sex that Annamarie later regretted. In closing, the defence counsel also made repeated reference to the jury using their common sense to assess the evidence (on 10 separate occasions), including the following passage:

***Well, as people of common sense, it is not beyond the pale to think that a young person who has another young man in the home with her and they have been drinking, they are sleeping next to one another and then it gets to serious stuff, she might have changed her mind and had the guilts, because that's what he is saying, and that is a real central human issue for you people to grapple with, because in effect those are the two competing narratives.***

Our concern with the references to common sense in this case, is that they risk the jury using a robust "common-sense" approach to the competing narratives, rather than undertaking a careful analysis of the individual aspects of the evidence. In our view, this

14 The same wording was also used in *Masters*.

has the potential to undermine a focus on the essential element of consent at the time of intercourse.<sup>15</sup>

On a related point, in two cases from the principal research the judges gave a direction under section 127 that there can be good reasons for a complainant to delay making a complaint and noted that this was simply a matter of common sense:

*Well, those are matters for you to assess, but I need to say, however, that there can be good reasons for persons' in the complainant's position for delaying making formal complaints in respect of allegations of this kind as you will, **as a matter of common sense**, I am sure appreciate. But what you make of it is totally a matter for you. (Walters)*

...

*There is evidence that Mrs Zhang, the complainant, delayed in complaining. The law allows me to speak to you about this aspect and this is a case where it is appropriate to do so because of the circumstances and timing of the complaint. There may be good reasons why a person who has been the subject of the actions alleged in this trial would not immediately complain. There are a very large number of reasons that immediately might come to mind such as embarrassment, humiliation, fear and the like. **There is, of course, both as a matter of law and as a matter of common sense, no legal requirement that any such complaint be made within any particular time.** The reality here is that a complaint was made within days but the defence suggests that it was a false complaint insofar as the issue of consent and the precise description of the physical events are concerned. What you make of the timing and the circumstances of the making of the formal complaint to the police is a matter entirely for your assessment. (Langley)*

We consider that judges should refrain from referring to the fact that people might delay complaining about sexual assault as a matter of common sense. After all, if it was common sense, there would be no need to give a direction about it. This illustrates one of the essential tensions in the current approach to trying sexual offences. Despite recommendations to consider other decision-makers in cases of sexual offences, there remains a commitment to the use of a jury, and with it, a “common-sense” and common-knowledge approach. However, the use of judicial directions about the use of particular evidence and other myth-busting evidence suggests that there may be some flaws in that approach, particularly when different jurors may have different “common-sense” notions about certain understandings of sex and rape. While common sense may still be an important yardstick, we consider that care needs to be taken in cases of sexual offences not to override the targeted directions

15 New South Wales Department for Women *Heroines of Fortitude: the experiences of women in court as victims of sexual assault* (1996) at 267.



aimed at disrupting notions about sex and rape that jurors might otherwise consider to be “common sense”. We consider that if there is seen to be a need to refer to the contribution to be made by jurors as part of their fact-finding role,<sup>16</sup> it should be to bringing their own knowledge about human behaviour (as an individual) to the collective endeavour, rather than an instruction to draw on generalised notions of what is “common sense”.

### Guidance on how to draw inferences

In 20 of the principal research cases and nine of 10 Pilot cases the judge directed the jury about the need to rely on inferences in assessing the evidence. Some judges used a general example to differentiate between guessing and speculating, and drawing a logical and reasonable conclusion from the evidence. Commonly, this example took the form of jurors entering a windowless court room on a sunny day, and then watching people come into that courtroom with wet umbrellas and raincoats. Jurors were instructed that this was a situation where they could reasonably and logically draw the conclusion that the weather had changed and it was now raining outside.

However useful this analogy is to the jury, in our view judges should endeavour to relate the drawing of inferences to the specific case the jury must consider. Some judges did this by simply stating the inference that the prosecution wished the jury to draw, such as the judge in the *Edwards* case who said:

*Now in this case the Crown invites you to draw inferences from all the circumstantial evidence that the accused did not, in fact, believe that the complainant was consenting to any of the sexual acts that he engaged in with her. Whether you draw this inference is for you to decide, as are all matters of fact.*

While we agree that this is more helpful to the jury than an isolated explanation of what an inference is, in our view it would be helpful for judges to more fully outline the arguments on both sides, where discussing inferences in the context of a particular trial. Often this may take the form of the prosecution asking the jury to draw an inference about the defendant’s state of mind, and particularly his belief in the complainant’s consent on the basis of particular facts in the evidence. However, this must be a balancing act, with care required that all possible inferences from particular facts are drawn to the jury’s attention.<sup>17</sup> We consider the judge’s effort to assist the jury in assessing whether or not to draw an inference

16 Research suggests that one of the benefits of the jury is the collective deliberation process: see for example David Tait and Jane Goodman-Delahunty “The effect of deliberation on jury verdicts” in David Tait and Jane Goodman-Delahunty (eds) *Juries, science and popular culture in the age of terror* (Palgrave MacMillan, London, 2017) 235 at 236; Jacqueline Horan *Juries in the 21st Century* (Federation Press, Leichhardt, NSW, 2012) at 62–64. For a critique of the role of common sense in admissibility decisions see Chapter Five at 124.

17 See *Maru v R* [2019] NZCA 223 at [20] where the Court of Appeal concluded that that judge’s direction on inferences led to a miscarriage of justice because it “concerned a crucial aspect of the trial and constituted a (no doubt unintentional) very clear invitation to the jury to accept the victim’s version of events”.

in the *Patel* case to inadvertently repeat reasoning based on rape myth before the jury again:

*So that is a kind of factual contest where an inference is suggested and you may or may not think that – to draw it depending on your view of the facts. And just to give an example on the defence side, a brief one. [Defence counsel] said you should infer from the fact that Ms Kowhai didn't call the police on 111 on her phone, just by having the phone an ability to do that, or her friends, and also from her not having taken the opportunity to tell the [helping agency] people while he was still around that she had been raped. That you can infer from that that she wasn't raped.*

*[The Crown] would say in response, you should not conclude in that way. It would be unsafe to do so because you need to consider that this was a young woman whose good Samaritan had turned on her and raped her, who was drunk, scared and unsure where she physically was, in an area she wasn't familiar with and when she was approached by the [helping agency] people she ran off because Mr Patel smirked at her. So, in effect, [the Crown] says, well a rape victim may not react in a calm, objective, sensible way and you should not judge her conduct in some sort of clinical manner, and that certainly does not mean that she was not raped just because she didn't ring the police immediately, for example.*

*So, again, that is a context as to whether you should draw that inference that the defence says you should draw. Of course, the defence has not to prove anything but [defence counsel] expressly asked you to draw an inference from that, that this was not a rape. So, you need to decide whether you should draw that inference or not.*

We consider that repeating the defence's arguments for why the jury should draw an inference that the complainant was not raped because she did not call the police or her friends immediately, or talk to the [helping agency] people may help to legitimise such a reasoning process for the jury. This is despite the fact that section 127 of the Evidence Act 2006 expressly allows the judge to warn the jury that there can be good reasons for a victim of sexual offending to delay, or fail making a complaint. While no such warning was given in this case (see below where we argue a section 127 warning should have been given),<sup>18</sup> we consider it also demonstrates the care needed by judges in contextualising their directions. Too little guidance to the jury, and it risks being unhelpful or confusing.<sup>19</sup> Too much risks repeating (and potentially reinforcing) reasoning processes that are based on unwarranted stereotypes. In our view, this demonstrates the difficult job faced by judges. However, as we discuss below, we consider that judges should be more proactive in seeking to counter such reasoning.

18 At 408.

19 See generally Jonathan Clough and others *The Jury Project 10 Years On – Practices of Australian and New Zealand Judges* (The Australasian Institute of Judicial Administration Incorporated, Melbourne, 2019).

### The forensic value of complainant demeanour when giving evidence

Judges in 16 of the principal research cases, and eight of the Pilot cases, gave the jury a direction about demeanour of witnesses. These directions focussed on the assessment of credibility of all witnesses, rather than just of the complainant. No particular formulation was apparent from the cases; however, many focussed on the need to take care not to rely on demeanour alone, such as this example from the principal case of *Wilde*:

*Be careful how you make those assessments. It is better to base your decision on a number of factors which include the demeanour of a witness, which is a matter for you. Consider the probabilities and the inherent plausibility of an explanation. Does it have the ring of truth? Is there a motive to tell untruths? Was there the opportunity to see, hear or do the things described by a witness? Did a witness exaggerate or minimise? Whether a witness is being consistent throughout.*

*People's recollection of events usually contain minor inconsistencies in matters of detail, especially events 29 months ago. You might be suspicious if people have their stories off so pat that every last detail dovetails perfectly. Sometimes, though, discrepancies are significant enough they may cause you to doubt a witness' evidence. Is the witness' evidence supported by other evidence, especially independent evidence?*

This approach is broadly consistent with the Supreme Court's comments in *Taniwha v R*<sup>20</sup> where the court said that in a trial where credibility is likely to be a major issue, trial judges could usefully include in their opening remarks to the jury a brief statement about the approach the jury should take to assessing competing accounts from witnesses. The Court referred to the following factors that could be referenced:<sup>21</sup>

- (a) whether the witness's evidence is consistent with the evidence of other witnesses which the jury has accepted;
- (b) whether the witness's evidence is consistent with objective evidence such as documents or text messages, and if it is not, what explanation is offered for any inconsistencies;
- (c) whether the witness's account is inherently plausible – does it make sense? Is it likely that people would have acted in the way suggested?; and
- (d) whether the witness has been consistent in their account over time and, if not, why not?

<sup>20</sup> [2016] NZSC 123, [2017] 1 NZLR 116.

<sup>21</sup> *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [44]–[45].

The Court then emphasised that the jury must consider a witness' evidence in the context of all the evidence in the case and that a direction along the following lines could be given:<sup>22</sup>

*I must warn you, though, that **simply observing witnesses and watching their demeanour as they give evidence is not a good way to assess the truth or falsity of their evidence.** For example, a witness may not appear confident or may hesitate, fidget or look away when giving evidence. That doesn't necessarily mean that their evidence is untruthful. The witness may be understandably nervous giving evidence in an unfamiliar environment in front of unknown people. Or there may be cultural reasons for the way a witness presents. On the other hand, a witness may appear confident, open and persuasive but nevertheless be untruthful. And remember that even an honest witness can be mistaken.*

*Things like gestures or tone of voice may sometimes help you to understand what the witness actually means. But you should be cautious about thinking that they will help you much in determining whether or not the witness is telling the truth.*

In the studies, however, there were a few summings-up (all except *Lino* pre-dated *Taniwha*), in which the judge seemed to suggest that a focus on assessing demeanour was appropriate:

*When considering the oral evidence given by witnesses you take into account not only what is being said but also how it is being said. **How you assess the demeanour of a witness can be a valuable aid in judging the witness's credibility and reliability** and by "demeanour" we mean things such as facial expression, the movement of the person's body, things of that kind. (*Roberts*)*

...

*In considering the oral evidence given by witness you take into account not only what has been said but also how it has been said, **how you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability**, that is honesty and accuracy. It is open to you to accept some parts of the evidence of a witness and reject other parts. It is not an all or nothing approach. (*Smythe*)*

...

*So, this demeanour of a witness, how a witness gives evidence can be overstressed but one of the things that we do in our everyday lives is **look at what people say and how they say it**. Do they answer spontaneously? **What was their body language?** Do they physically react in a way that you would expect? (*Masters*)*

...

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22 *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [46].

*How do you decide whether witnesses are being truthful or not? Well, you use the skills that [defence counsel] touched on, that you use in everyday life. When you think about it, when we talk to our friends or our children or when we watch one of our politicians on the network news, **you normally look and watch them as they speak**, you take into account the words they use, you use your experience of life to decide whether what they are saying adds up within itself when compared to other factors which you accept and whether it is what you would expect someone in those circumstances, at that station of life, to have experienced those sorts of things they are to be telling you and whether it is truthful or not? (Lino)*

These summings-up suggest that the jury should look at the way witnesses act while giving evidence as an indicator of their credibility. The guidance given by the Supreme Court in *Taniwha* should also be followed in adult rape trials, where assessments of the credibility of the complainant are of particular significance. Care should be taken regarding juror expectations about how distressed a complainant should appear when giving evidence of the alleged rape, given that a flat affect is not necessarily inconsistent with the demeanour of someone who has experienced trauma.<sup>23</sup>

### **Juror reliance on submissions made in closing arguments during deliberations**

In 20 out of the 30 principal research cases, and eight of the 10 Pilot cases, the judge directed the jury about the use they could make of counsel's closing arguments. The major point to be made is that while jurors must take account of what counsel said in their addresses, counsel's submissions do not amount to evidence. Instead, evidence comes solely from witnesses, and any other evidence. This direction took a number of different forms. One of the briefest comments simply stated:

*You must also consider counsels' addresses to you about the facts, bearing in mind of course that counsel do not provide the evidence.*

Several of the cases used directions in similar formats to the one found in the *Moss* summing-up:

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<sup>23</sup> See for example the research cited in Regina A Schuller and others "Judgments of sexual assault: The impact of complainant emotional demeanour, gender and victim stereotypes" (2010) 13 New Criminal Law Review 759 at 768 and in Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance and Victim Blaming" (2010) 22 Canadian Journal of Women and the Law 397 at 427; Judicial College *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf> Example 7 at 20.7.

*What counsel said to you in their final addresses yesterday is not evidence. Those are submissions which have been made to you. Of course, you should carefully consider what the lawyers have said to you which I am sure you will have found of assistance when you come to grapple with the evidence. But, as I said, what counsel say is not evidence in itself.*

While we agree that judges should be directing the jury about the role of counsel's addresses in drawing their conclusions, we prefer a slightly more comprehensive direction than those examples given above. In our view, a direction such as that given in the *Vandenberg* summing-up (below) clearly explains to the jury the role of closing addresses, and the way in which they differ from the evidence the jury is expected to rely on in coming to their decision:

*Also, of course, you must consider what counsel have said in their excellent addresses to you but of course, what they're doing is advancing argument to you as to why you should make a finding in favour of their particular interest in the case. So, by all means take into account their addresses to you but it is for you to decide what evidence and what witnesses you find acceptable. What you make of those witnesses and the evidence is entirely a matter for you. It is for you to decide what witnesses and what evidence you regard as being credible and reliable.*

In our view, there is also merit in judges going a step further than this in explaining what the evidence is. In our view, given the nature of questioning in sexual assault trials, judges should also direct the jury that questions from counsel are not evidence. Instead, the evidence comes from the answer given by the witness. In our view, judges should routinely give a direction such as that given by the judge in summing up the Pilot case of *Waititi*:

*[Defence counsel] cross-examined Ms Fan on other possibilities about what might have happened in the hallway and the bedroom. For example, one suggestion he put to her was that when Ms Fan said no and began pushing him that the defendant quickly stopped what he was doing. Lawyers' questions like that are not evidence if they are not accepted by the witness. Ms Fan rejected that suggestion and there was no other direct evidence to support it.*

*However, those sorts of questions are perfectly legitimate ones. They are designed to demonstrate that there are other possible scenarios that the Crown must exclude as a reasonable possibility. The critical point is this: the defendant does not have to point to any alternative scenario or explanation. If he suggests one, then he does not have to satisfy you that it is true. It is the Crown who has to prove that Ms Fan's allegations are true. The defendant does not have to prove anything at all.*

While this direction was given to the jury in the context of explaining the burden of proof (and, in particular, that the burden always remains with the prosecution) we consider it a good example of the way in which a jury might be informed about what is the evidence in the

case, and what is not. Another, even more comprehensive example, is found in the principal research case of *Edwards*, where it appears from the transcript of the summing-up that the judge read a long passage of the cross-examination of the complainant:

*Now, members of the jury, it's important for you to understand that just because counsel suggests something to a witness in a question does not make what is suggested evidence. It only becomes evidence if the witness accepts the proposition or if there is other evidence to support the proposition. In this case I must remind you of the questions asked by [defence counsel] and the answers given by the complainant in relation to this issue. While I'm referring to a particular passage in the evidence which is central to this issue it may not be all of the evidence that bears on this issue. It is important that you have regard to all the evidence on the topic but the passage that I'm going to refer to does illustrate the point that I wish to make. I refer you to page [ ] of the transcript starting at line [ ] going through to page [ ] ending at line [ ]. Now I'm going to read the passage to you just to refresh your memory. These are [defence counsel's] questions of the complainant ...*

After reading out a portion of the transcript where defence counsel was questioning the complainant about oral sex, and in particular, putting the proposition that the complainant had been giving oral sex in order for the defendant's penis to get hard enough for sexual intercourse, the judge said:

*From that exchange, members of the jury, you can see that [defence counsel] was trying to get the complainant to accept that she performed oral sex on the accused to obtain an erection for him so that he could have sexual intercourse with her. It is a matter for you and not for me but I suggest it is apparent that the complainant did not accept those propositions.*

In our view, judges should consider using this approach of referring to a specific passage from the evidence and indicating that despite frequent or ongoing questioning, the complainant did not accept the proposition of the defence counsel. In our view, this would assist the jury to focus on the evidence of the complainant, rather than on the questions put to her.

Judges must also remind the jury that before accepting a submission from counsel, there needed to be evidence to support that submission. One example was the principal research case of *Carter*, where the judge said:

*Now, you had the benefit of hearing two fine closing addresses from experienced counsel, if I may say so. Why I mention that is that they are submissions that are made to you. It is not evidence. Of course, you will want to carefully consider what both of the lawyers said to you and I am sure that what they said will be of assistance. But they do not give evidence. Perhaps an example of that is a point [the Crown] made. [Crown counsel] made a submission that Mr Carter had a need to ejaculate. Now, it is not a criticism of her but there is no evidence about that.*



The judge in the Pilot case of *Kata* made a similar comment. In that case, defence counsel made a submission in closing that the complainant was intoxicated and that intoxication removes inhibitions and might heighten sexual desire and cause people to act in way they might later regret. He then submitted that the complainant did not want it to go any further, that she was embarrassed but that the story, and allegation, was picked up by someone else. In summing up, the judge summarised the defence counsel's submissions and reminded the jury not to speculate, as they knew the complaint was made:

*[Defence counsel] says that we all know what alcohol does, that it removes inhibitions. He says that you might think that it may heighten sexual desire and make people act in the way that they later deeply regret. The complainant did not want this matter to go any [further], she said she was embarrassed. "Well, if she was embarrassed," said [defence counsel], "why say anything to anybody? And if she did not want it to go any further, was there perhaps a reason that she did not want it to go any [further]? You know that she was in a relationship."*

*Well, that is a submission that you are entitled to take into account, but be very careful that you do not [start] to speculate. What you do know is that the complaint was made.*

In our view, statements such as that could have been much more frequently used by judges to warn juries about the need not to speculate about the reasons why women did or did not complain, or why a complaint might not have taken the form jurors might otherwise expect. Judges should be alert to submissions that might invite jurors to speculate in reliance on rape mythology, in particular.

### Preferable structure of a summing-up

In both studies, there was a range of approaches taken to the summarising of the prosecution and defence cases. Some judges summarised the cases as they addressed the legal tests. For example, in *Gamage*, when discussing consent, the judge summarised the prosecution and defence cases in relation to this aspect of the trial:

*So, the first issues I want to deal with in relation to these two charges is this issue of consent on behalf of Ms Taylor. And if you go to the document which is in bold headed up "Consent," I just want to walk you through this. Consent on behalf of a complainant means consent freely given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. Although, that circumstance may of course be relevant to the issue of the accused's belief in consent. Consent given reluctantly and later regretted is nonetheless true consent. Not wanting sexual connection is not the same thing as not consenting to it. The material time when consent and a belief in consent is to be considered is at the time the sexual connection actually took place.*



*The complainant's behaviour and attitude before or after the act may be relevant to that issue, but it is not decisive. The real point is whether there was true consent.*

*And our Crimes Act proscribes a number of circumstances, and it's not an exhaustive list, where allowing sexual activity does not amount to consent. And allowing, in a legal sense, ladies and gentlemen, includes acquiescence, submits to, participates and undertakes. And the matter here which is relevant is that the application of force to the complainant or another or the threat or fear of such application of force would not amount to consent. There are several other factors set out there, however it's really number one which is relevant in the context of this case.*

*So just dealing with that issue of Ms Taylor's consent and the competing cases, the Crown say to you that Ms Taylor in assessing her you need to assess her subjectively and objectively. That subjectively is that you take into consideration who she actually is. You consider for example her schooling, her education, her demeanour, whether or not you agree with the doctor, that she appeared as simple and naïve, whether she was experienced in life and the fact that she suffers from an anxiety disorder which was not disputed. All of those factors come into play.*

*And in relation to consent, Ms Taylor was adamant that she did not consent to the sexual conduct. She told the interviewer that she said, "No," that she didn't want this to happen, she was crying, that he used force, in terms of pulling her down, and she was really fearful and she was frightened about what would happen. And that's why she didn't try and get out the door, because she said that she didn't know whether she could get out the door, she thought it was locked. And in support of that the Crown also say to you, "Well, consider for a moment what she did". Here is this young woman, and viewed objectively you might think, "Well if she's just been raped why didn't she run out the door?" But she said – so she called her cousin, and as soon as her cousin came, she left. She didn't think she could do that on her own. She had to get the support of someone else to assist her to get out of there.*

*And the Crown say, "Well just think about the implausibility of the defence case". If she had entered into a consensual sexual act with the accused and it was a pleasant experience, as the accused would have you believe, why would she complain? Nobody would have known about it; nobody would've done anything about it, and yet we have, the Crown say, an immediate complaint to her friend and she appears distressed and upset. So, the Crown say here that as far as Ms Taylor is concerned in relation to this issue of consent, she was a sixteen-year-old girl being dominated by a very experienced sixty-eight-year-old man in a situation where she lacked the ability to resist. And she was very fearful to resist because she didn't know what the consequences would be if she did.*

*On the other hand, the defence case is that she was consenting and she was consenting because she had made this agreement the night before, or the day before rather, after she had either seen, depending on what version of the defence case you accept, that she had seen a porn site or had viewed porn on [date] and it was at her instigating that she suggested this transaction with the accused and therefore she was fully consenting in relation to the sexual activity that took place on [date] and she in fact was the instigator, the defence say, of the sexual activity that took place on [date].*

In our view, this approach is preferential to that where a judge outlines the law, then provides a (sometimes quite detailed) summary of the prosecution and defence cases separately.<sup>24</sup> This latter approach has the potential to reinforce any unwarranted arguments made by the defence (or the prosecution), even if the judge may have already directed the jury about the use of those arguments. For example, in summing up to the jury, the judge in *Walters* said:

*Well, those are matters for you to assess, but I need to say, however, that there can be good reasons for persons in the complainant's position for delaying making formal complaints in respect of allegations of this kind as you will, as a matter of common sense, I am sure appreciate. But what you make of it is totally a matter for you.*

However, when later summarising the defence case, the judge repeated the defence argument that the fact that the complainant did not complain immediately was an indication that the sexual contact was consensual:

*The defence submit she could have called for help. She was communicating with friends and her mother during the time. She became aware that there was at least one other flatmate at the home at the time. She had the opportunity, and she could have complained then at that very time. Then the taxi driver who found her, found her not to be looking upset and playing on her phone. Not complaining. Then she said nothing to her mother when she got home. The defence say that in the days following she demonstrates by her words that this was a consensual sexual encounter with these communications to others.*

While this is undoubtedly an accurate summary of the defence case, we consider that it may have the potential to undo the warning already given by the judge that there can be good reasons for delaying making a complaint. We recommend that judges should consider integrating their summaries of the prosecution and defence cases into their directions on the law, rather than providing a wholesale summary at the end of their summing-up, which we believe risks repeating, and perhaps reinforcing, unwarranted assumptions.

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<sup>24</sup> Appellate authority indicates that paraphrasing the closing arguments does risk needlessly repeating “counsel’s rhetorical flourishes” and all that is required is for the judge to put the essence of the defence case and the evidential basis for it: see *R v Fotu* [1995] 3 NZLR 129 (CA) at 187; *R v Guild* CA 219/04, 11 October 2004 at [95].

### *Thematic analysis of the reinforcement of, and resistance to, rape myths*

What follows is a thematic analysis of the types of myths and misconceptions we found in defence closing statements, and the attempts to resist, or “myth bust” these. We look in turn at some of the myths deployed in jury trials, and note the way these are addressed or rebutted by the prosecution or the judge, and consider ways to support an increased role for judges.

### *Myths about delay: use of section 127 of the Evidence Act 2006*

Section 127 of the Evidence Act 2006 allows a judge to correct the misconception that a victim of rape or sexual assault will always immediately complain about the offending.<sup>25</sup> In other words, it acts to neutralise any assumption that delay in complaining about an alleged rape indicates that the allegation is false.

Section 127 states:

#### **127 Delayed complaints or failure to complain in sexual cases**

- (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
- (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

The Supreme Court has confirmed that the direction on delay can be given even if the complainant gives a reason for her delay in complaining.<sup>26</sup> This is particularly important if the defence attacks the credibility of the complainant on the basis of the delay in complaining about the alleged offending, because the jury may not believe the complainant’s explanation for the delay.<sup>27</sup> It is also worth noting that a direction under section 127 does not mean the jury must treat a delayed complaint as neutral. The relevance of any delay in complaining about a rape or sexual assault, taking into account that there may be good reasons for delay, remains a matter for the jury.<sup>28</sup>

25 See further Chapter Six at 219.

26 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [48].

27 At [48].

28 *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 at [51].

The Act does not explain what is meant by “delayed making” a complaint. We would not necessarily expect such a term to be defined in the Act, but it seems that some defence counsel are trying to draw on the underlying misconception that delay must mean a false complaint even in situations where there does not appear to be any delay at all. In closing the defence case in *Harete*, counsel stated:

*So, we have 11ish until the police get a complaint at about 12.30 the next morning, an hour and a half. That’s not an immediate complaint to the police.*

This comment by defence counsel occurred in a situation where the complainant was allegedly raped walking to her sister’s house. Once she arrived at her sister’s, she immediately told her sister that she thought someone had had sex with her. She was taken to a medical centre where the police were notified. It is hard to criticise the actions of the complainant in this case on the grounds of not disclosing the alleged offending earlier. It certainly does not fit the rationale of section 127 to explain to the jury that there may be good reasons why a complaint is not made days, weeks or even months after a sexual assault. Arguably, what is required in this case is not a direction under section 127 at all, but rather a comment by the judge that, while a matter for the jury, the jury might like to consider whether a delay of 90 minutes in this situation meant there was not an immediate complaint.

In seven cases from the principal research and two of the Pilot cases, the judge gave a direction under section 127. As outlined above in Chapter Six, the length of delay between the alleged rape and the first complaint was, in general, not long, with 88% of the cases from the combined principal research and Pilot sample of 40 cases complaining to someone within two days.<sup>29</sup> In the cases in the principal research, there were five cases where the delay between alleged offending and complaint was more than three days. A section 127 direction was given in four of those five cases.

Another case where it would have been open to the judge to give a section 127 direction is *Roberts*, where defence counsel sought to make much of the fact that the day following the alleged rape, the complainant “did nothing”:

*The subject that we come to now is the next day. What did she do and what didn’t she do? Of course, what didn’t she do may well be a really important question for you to look at. Crown lawyers often say, and they’re absolutely right, that there is no set procedure that women who are the victims of sexual abuse should follow, there’s no standardised reaction. Human beings are different and people always react in different ways and acting in one way doesn’t guarantee the truth of anything and acting in a different way doesn’t impact on that either, but the reality is that she did nothing that day. She says that she texted Ed after some time. Ed says, “No”. He said, “I waited. I waited all day. Finally, around*

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29 At 218.

*about 4 o'clock I began to walk from [suburb] over to [entertainment precinct]". So, Lara didn't ask anyone for help, she didn't phone the police on her own, she didn't telephone Dr Z's surgery on her own, she didn't text Ed at about 9.30 or 10 and say, "I need transport. Please come around here straight away". She lay in her bed, and we know from what Mark said that she cried, and later on Ed arrives at her home and she says, "It's not my fault".*

While the defence counsel was quick to state that there was no standardised reaction that victims would make, it does not stop invited reliance on the complainant's reaction as an indicator that the alleged rape was consensual sex later regretted by the complainant.

In *Walters* the judge did make a comment that there are good reasons why a complainant might delay making a formal report. Here, defence counsel sought to make much of the fact that the complainant did not complain to a taxi driver as she left the address where she had allegedly been raped, nor immediately to her mother once she arrived home:

*In the taxi, again, the taxi's driver's important. He's independent testimony. He's got no axe to grind. He says, "The female did not show any sign of being upset. We talked a little bit but I think she was playing on her cellphone a bit". She said to me, I said to her, "You weren't distressed at all," and she said, "Oh, of course I was, yeah". And I said, "You sure?" and then I put to her what the taxi said and then she said, "I don't express emotion very well". Come on. If she had been raped by this guy, the taxi driver would've picked it up and you might've expected her to have said, "Take me to the police," or hospital, or something, but not home to Mum, and then if she had been raped, even though she had this dreadful relationship with her mother, you might've expected her to have said, "I've been raped". It would've been a cast iron excuse for her for not being, you know, home earlier if she'd wanted one. "I've been raped, Mum, I couldn't get home." She didn't say any of those things. Not because she wasn't embarrassed, but because they didn't happen. All she's done is had sex with the guy and she's later regretted it because of what her friends have said. That's all that's happened.*

The judge responded:

*Next, some emphasis has been placed, both in cross-examination and in submissions by the defence, on the proposition that the complainant could have complained much earlier than she did of being raped, including crying out for help at the time or texting or phoning for help at the time when she apparently had the opportunity, or talking to the taxi driver who had picked her up, or talking to her mother when she got home, instead of waiting for around six days before going to the police.*

*Well, the defence submit that her failure to do so supports the premise that this was consensual sex at the time. That she just came to regret it later on when her friends got down on her about it, and it was only the pressure they put her under that saw her then going to the police and making what the defence admit, was a false complaint of rape.*

*While the Crown submit that it was not that simple, that she was naïve, immature, she was conflicted, she nursed feelings of self-blame for the situation she had got herself into, she was frozen with fear, she could not raise a human cry, she could not be expected to confide in a strange male taxi driver, and she was wanting to spare her mother further stress and upset at the time. She was too embarrassed to go to the police, and it was only with the help and support of her friends, and the passing of time, that she gradually understood and came to grips with the true position and gained the strength to take this to the authorities.*

*Well, those are matters for you to assess, but I need to say, however, that there can be good reasons for persons in the complainant's position for delaying making formal complaints in respect of allegations of this kind as you will, as a matter of common sense, I am sure appreciate. But what you make of it is totally a matter for you.*

We support the use of a section 127 direction in this situation, but note that the judge's explanation that there can be good reasons for delaying making a formal complaint only answers part of the defence's comment. The real suggestion from defence counsel was that, if the sexual contact was truly rape, she would have complained to the first people she saw, regardless of who those people were (in other words, the lack of a "hue and cry" meant her story should be doubted). We do not consider that this invited inference was addressed by the terms of the section 127 direction that was actually given.

One case where a section 127 direction almost certainly should have been given was *Patel*. In the defence's closing statement, the following passages occurred:

*If it was non-consensual, why the lack of enthusiasm to go to the police? Why not tell the [helping agency] people in the area that she had been raped, when Mr Patel was in the area where he could have been clearly identified. That suggests that there was some sort of consent. As her friend, HH said, she said that people from [helping agency] stopped and asked her if she was okay. She told them she was. Well if she had just been raped surely, we would say, look, I've just been raped and that's the man there. While she was talking, and Ms HH goes on to say, she says while she was talking, the guy who raped her walked past and sneered at her. This makes no sense and that suggests that she hadn't been raped.*

...

*If she'd been raped and violated, as she says she was, well that would've been a simple matter to, at least tell the [helping agency] people, or tell the police, she had a phone, she could have dialled 111, and even with her friend, she told her friend not to tell the police. Well that raised suspicions. She didn't want to tell the police because she, in fact, at that stage she hadn't been raped. If she'd been raped and violated like that, I'm sure she would have yelled, screamed, protested and been anxious to have Mr Patel apprehended and tell the police.*

In this case, the defence closing went further than simply suggesting that because the complainant did not complain immediately she must not have been raped. Instead, defence counsel sought to suggest that the failure to complain was indicative of consent at the earlier time of sexual intercourse occurring. It is difficult to see how immediate failure to complain could be indicative of consent given earlier, unless you accept that all victims of sexual assault complain immediately to the first person they see – a view that is now widely accepted to be in error.<sup>30</sup> The point of a direction under section 127 is to “neutralise the erroneous perception that a victim of a sexual offence would complain immediately”.<sup>31</sup> There is no doubt that the defence counsel's comments in this case would not only have allowed jurors to fall back on any erroneous misconceptions they already held, but would actually have reinforced, and potentially helped to validate, such misconceptions.

The statement that the complainant, if she had just been raped, would surely have immediately said “look I've just been raped”, is exactly the misconception the section is designed to correct. The absence of a section 127 direction in this situation leaves the jury with the erroneous assumption that it is permissible reasoning to use the complainant's failure to complain to strangers (albeit of a helping agency) or her friends or the police in the immediate aftermath of the rape as evidence of the fact that she was not raped. Notwithstanding the fact that section 127 leaves it up to a judge whether or not to give the direction in any case, we believe this case is precisely the kind where the direction should have been given.

We consider that this case also demonstrates a need for section 127 to be amended to allow the judge to direct the jury that there might be good reasons why a complainant does not tell the first person they see about the alleged rape, or delays making a formal complaint (that is, to the police). The prosecution in *Patel* sought to make much of the fact that the complainant had told her friends what had happened almost as soon as she could:

*As soon, the Crown says, as she was raped, she texted her friend Hine and she texted BT. In both of those texts she referred to being raped. When BT saw her at the [shops] he said when describing her, “It's like she had seen a ghost you know, I'd*

30 See for example New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.57] and the sources cited.

31 *Bian v R* [2015] NZCA 595 at [51].



*never seen, yeah, never seen her like that.” He then later said when he was talking about her crying, “I sort of had to hold her up because she was devastated.”*

As noted above, the complainant in *Patel* confided in friends almost straight away but did not complain to the police until three days later. We consider that in *Yamada* an amended version of a section 127 direction would have assisted the jury in assessing the defence counsel’s insinuation that because the complainant had delayed making a complaint **to the police**, it was necessarily false:<sup>32</sup>

*She had the time to form a plan, you know, when she got out of there, she didn’t drive straight to the police station did she, and report it, five minutes later. She didn’t even go to the police five hours later. She went to the police five days later and so she had some time to, those feelings developed and put a chain of events in course.*

In the Pilot case of *Lino*, a similar argument was raised, that if the complainant had really been raped, there was no reason for her to be reluctant to go to the police:

*So, what does that tell you? Well there is only one thing it should tell you. I say you use yourself people common sense, then you’ll find about she didn’t want to go to the police and you should ask yourself rhetorically the obvious question that has to be asked on that one, and you don’t need me to tell you what it is. Have a look, page [ ], lines [ ] to [ ]. “In effect Dad made you go to the police station, didn’t he?” “Yep.” And that’s why I – and there’s no pleasure in that for me to do it, why I was obliged to cross-examine Dad and take him back to what he said in his statement. It’s a matter for you entirely but you might have thought Dad had a pretty powerful personality and she would do precisely as he told her to do. It’s is a matter for you. You judge these human beings not me, but there’s her word, she didn’t want to go to the police. Why? She had been raped.*

We consider that an amendment to section 127 would make it clearer that there are good reasons why a complainant might not want to make a complaint to the authorities, and might only do so after discussion and support from friends or family members.<sup>33</sup>

32 Similar submissions were made by defence counsel (about the significance of failing to report immediately to the police) in three other cases in the principal research.

33 There may also be cultural or experiential reasons for delaying going to the police, as well as variations as to how people process trauma and make sense of what has happened. See the majority’s suggestion for a delay direction in *R v DD* [2000] SCC 43 at [65] (cited in Lisa Dufraimont “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44 Queen’s Law Journal 316 at 344): “[T]here is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.”



We consider that section 127 could be amended to allow a judge to comment that not only are there good reasons why a complainant may not make a formal report immediately, there are also good reasons for a complainant not to tell the *first person* she sees after the alleged sexual assault occurred. A judge should be permitted to tell the jury that different people react in different ways and there is no particular *way* to complain about sexual offending that means the allegation is more likely to be true. A complainant may or may not complain to a family member or close friend, and may or may not complain to a formal agency or other source of authority. They may also make a complaint incrementally, and not use particular words (for instance, they might not name it rape).

However, we recommend the repeal of section 127, and that information about the varying ways that someone may complain about sexual violence forms part of “counter-intuitive” judicial directions. In cases involving child complainants, section 9 statements are increasingly used as a way of providing information about reasons for delayed or non-reporting,<sup>34</sup> while these are rarely used in relation to adult complainants.<sup>35</sup> We also consider the use of the term “delay” is unnecessary. Information about the variation in *how* people report sexual violence (time, recipient, detail, language), based on a range of environmental and personal factors,<sup>36</sup> need not refer to the now somewhat pejorative inquiry into, or emphasis on, delay.

### Prosecutorial reliance on lack of delay in complaining to support complainant’s account

While defence counsel in the research cases sought to make much of any delay in complaining about the alleged rape, in some cases prosecutors used lack of delay as supporting the complainant’s account (essentially bolstering her credibility). This was not a particularly common strategy by the prosecution, but in six of the principal research cases and three of the Pilot cases the prosecution sought to bolster the complainant’s credibility by emphasising the fact that she had complained immediately, or shortly after the alleged offending. For example:

*There is one final reason I suggest you can accept the complainant’s evidence, not only because she was remarkably honest and credible, but she was prepared to concede when she didn’t know something, when she couldn’t recall something. But why else? Because that’s what she immediately told those around her in the moments after the realisation hit. She went out to tell Kieran she’d basically been*

34 See for example *Paul v R* [2019] NZCA 390 at [19].

35 We are not aware of any cases in which this has occurred, based on a search of legal databases. It did not occur in any of the 40 cases in this research.

36 Such as not being able to initially recognise, or accept, that what happened was rape, or view it as “serious”: Melanie Randall “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance and Victim Blaming” (2010) 22 Canadian Journal of Women and the Law 397 at 431.

*raped. She told Glen the next day that penetration had happened. She didn't change her story after talking to them. So that is the Crown case.*

...

*You need to take into account that as soon as she saw another person, she made an immediate complaint. She immediately talked about the fact that she had sex and that it was not consensual.*

As noted by Olivia Smith and Tina Skinner, prosecution reliance on stereotypes to support the complainant's evidence also perpetuates reliance on misunderstandings about sexual violence.<sup>37</sup> In their court observation study (involving 18 adult rape and sexual assault trials, with an additional 10 in a pilot study) they found that in almost half the trials, defence counsel argued that it was legitimate for them to discuss rape myths because the prosecution had used them as supporting evidence where appropriate.<sup>38</sup> While we did not find any examples of defence counsel making similar arguments, we do endorse Smith and Skinner's comment that any sort of reliance on rape mythology reinforces its role in trials.<sup>39</sup>

### Directions on previous consistent statements (section 35 of the Evidence Act 2006)

Given the historical expectation that a victim of sexual assault would immediately raise a "hue and cry" and immediately complain,<sup>40</sup> it is no surprise that at common law, evidence of "recent complaint" was admissible. As outlined above in Chapter Six, the common law requirement was that a previous consistent statement (the "complaint") would be admissible if it was made at the first reasonable opportunity following the offence.<sup>41</sup> However, section 35 of the Evidence Act 2006 now greatly simplifies the rules around admissibility, in particular by removing the requirement that the complaint be made "at the first reasonable opportunity".<sup>42</sup> The result is that in all 40 cases in our research (30 from the principal research and 10 from the Pilot) included some evidence about the first complaint made by the complainant. As discussed in Chapter Six, we have information about the admissibility decisions surrounding some of this evidence.<sup>43</sup> The purpose of the discussion in this chapter is to identify the way the evidence is treated by counsel in closings, and by the judge in the summing-up.

37 Olivia Smith and Tina Skinner "How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26 Social & Legal Studies 441 at 455.

38 At 455.

39 See also Chapter Three at [51](#).

40 See further at [418](#).

41 Simon France (ed) *Adams on Criminal Law – Evidence* (Thomson Reuters, online) at [EA35.15(1)].

42 See Chapter Six for a more detailed history of section 35 of the Evidence Act, at [215](#).

43 At [218](#).

At common law, a previous consistent statement of a complainant was admitted to prove consistency of the complainant's account, thereby demonstrating that she had not (recently) made the allegation up. However, evidence of the complaint was not admissible to prove the truth of its contents.<sup>44</sup> The position is different under the Evidence Act 2006, with the Supreme Court in *Hart v R* noting that the general approach of the Evidence Act does not support limited admissibility. Instead, the Evidence Act proceeds on the basis that in general, evidence is either admissible for all purposes, or not admissible at all.<sup>45</sup>

However, the position on this point became less clear after the Supreme Court decision in *Guy v R* where Elias CJ and Glazebrook J stated that if the previous statement of the complainant had been admitted, the judge should have directed the jury that:<sup>46</sup>

*[T]he statement was not additional evidence independent of the complainant and corroborative of the evidence she had given at trial but simply evidence which might assist it in determining a challenge to her veracity based on recent invention.*

This approach has not been treated as creating a new presumption in favour of such a direction by the judge being given in all cases. In *Gillan v R* the Court of Appeal said:<sup>47</sup>

*[W]e do not read the statement in Guy v R about the direction that would have been necessary in that case as prescribing a standard direction for all previous consistent statement evidence. Such evidence can vary widely. The complainant's 17-page statement left in the jury room in Guy v R is at one end of the spectrum. A statement that the witness told others "what had happened" is at the other. Sometimes, a statement may be broadly consistent with the trial evidence, but inconsistent on some aspects. Here, trial counsel cross-examined T on his text messages, and on his statements to his father, to highlight inconsistencies with his evidence at trial. The direction to be given in a particular case must reflect the issues in that case.*

In *Penman v R* the Court of Appeal was even clearer in stating that it did not view *Guy* as returning the law to the point where a previous consistent statement could only be used for credibility, rather than truth:<sup>48</sup>

*[Counsel's] argument and the directions he suggested the Judge should have given appeared (at times) to rest on the erroneous assumption that evidence of a previous consistent statement admitted under section 35 only goes to*

44 Simon France (ed) *Adams on Criminal Law – Evidence* (Thomson Reuters, online) at [ED12.05(7)].

45 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].

46 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [48].

47 *Gillan v R* [2015] NZCA 85 at [35].

48 *Penman v R* [2015] NZCA 364 at [22] (footnote omitted).

*credibility. It is, however, now well-established following the Supreme Court decisions of Hart v R and Singh v R that once admitted under section 35 a previous consistent statement is evidence of the truth of its contents. ... [W]e do not consider the judgment of the Chief Justice in Guy is to be interpreted as departing from that well-established principle. If any change had been intended, it would have been expressly acknowledged and reasons given.*

The Court of Appeal went on to consider what the judge had told the jury in the case, noting that the judge had drawn the jury's attention to the Crown and defence's different claims about consistency and inconsistency of the evidence, and gave a general direction on credibility and reliability. The judge told the jury to ask themselves a number of questions when assessing the reliability and truthfulness of witnesses, including:<sup>49</sup>

*... Is what the witness says consistent throughout the entire witness' evidence or are there inconsistencies? Is what the witness says in the evidence consistent with what the witness said on a prior occasion and is that inconsistency important, in any event, in the context of the case or is it just a detail of minor significance? Because inconsistencies on important matters can affect how you regard that witness' credibility, their truthfulness and reliability.*

The Court noted that generally speaking trial judges should also explain why the statements have been adduced. They should also remind the jury that of itself repetition does not necessarily make something true. An untruthful person might continuously repeat the same lie.<sup>50</sup> The warning (a repetition warning or direction), was also considered in *W* (CA362/2016) v *R*, where the Court of Appeal said:<sup>51</sup>

*Where a complainant's previous consistent statements have been admitted, it will often be necessary for the judge to direct the jury that the previous consistent statements are not additional evidence independent of the complainant and corroborative of the evidence given at trial, and to warn the jury that repetition does not of itself make something true, because an untruthful person might have repeated a lie. A judge should consider whether such direction is needed. Generally, it will assist a jury, but there is no absolute requirement for such direction, and failure to give a repetition direction will not necessarily be fatal. Where the evidence that has been admitted under section 35 is not capable of affecting the result, a failure to give the appropriate direction will not result in a miscarriage of justice.*

49 *Penman v R* [2015] NZCA 364 at [24], quoting *R v Penman* DC Hamilton CRI-2010-068-523, 14 March 2013 [Summing-up] at [12].

50 *Penman v R* [2015] NZCA 364 at [25].

51 *W* (CA362/2016) v *R* [2017] NZCA 259 at [61] (footnotes omitted).

The Court held that a repetition direction should have been given in this case because of the number of previous consistent statements admitted (at least five) and the fact the prosecution sought to use them to corroborate the evidence of the two complainants.<sup>52</sup> However, the lack of a repetition direction did not give rise to a miscarriage of justice.<sup>53</sup>

In our case sample, a judge gave a direction related to previous consistent statements in around half the principal research cases, although in a small number of these cases, the warning was not directly related to the complainant's evidence. In two of the cases where we have the information about an admissibility decision relevant to section 35 (*Ahmed* and *Vandenberg*), there is no specific direction to the jury about the use that can be made of this evidence. As noted above, the lack of a direction does not necessarily lead to a miscarriage of justice. However, in closing statements in the *Ahmed* case both the prosecution and the defence briefly referred to the complainant's recent complaint to her cousin's wife (the complainant left the defendant's house after the alleged rape and went straight to her cousin's house around the corner). Defence counsel commented that people can tell a lie more than once, so the evidence of the complainant's prompt disclosure to her cousin's wife was simply evidence that the complainant had told her story more than once. It did not go to prove the truthfulness of what she was saying. While it would have been open to the judge to give a direction to the jury about the use of the complainant's previous consistent statement, given there was not a particular focus on it by the prosecution or defence, we do not consider anything turned on the omission in this case.

In the *Vandenberg* case, the defence argument was that a conversation that took place between the complainant, Zara, and her friend Madeleine a day or two after the alleged rape was not consistent with her evidence at trial (although there were two earlier complaints which, although much briefer, were arguably consistent). In these circumstances, it is perhaps not surprising that there was no direction about the use of previous consistent statements (although this may have been useful, given there were other prior statements that could be considered consistent, and which might have provided balance to the statement the defence argued was inconsistent).

### Use of a repetition warning

In the principal research cases where a previous consistent statement direction was given, the judge included a repetition warning in 10 of them. In all three of the Pilot cases where a previous consistent statement direction was given the judge gave a repetition warning. In our view, repetition warnings should not be required as long as section 35(2)(a) is properly applied. If the previous consistent statement is sufficiently probative to respond to the challenge to the complainant's veracity or accuracy, the jury should be entrusted to give

52 *W (CA362/2016) v R* [2017] NZCA 259 at [62].

53 At [68].

the evidence appropriate weight. In other words, if the previous consistent statement can be considered to prove the truth of its contents and is admissible under section 35, there is a risk that the repetition warning could put the jury off relying on the statement on the basis that they do not know whether it is true or not. Telling a jury that repeating something does not make it true risks blurring the lines about how the evidence can be used.

If a repetition warning is to be used, we consider care needs to be taken in the way it is expressed. In our view, the form of the warning in *Carter*, where the judge first outlined the evidence in question, is of the most help to the jury:

*Now in her evidence, Louisa told you about waking up, realising what was going on, going to the toilet and then going onto the couch with her friend Danny. She also told you about talking to Clare in the morning. Louisa was not absolutely clear as to what she had said to Clare, but you heard from Clare that Louisa told her that she woke up and someone was having sex with her, and when she was asked, "Was it consented?" she said, "No".*

*Initially she refused to say who it was, but then said it was Chris' brother, then confirmed it was the defendant. Clare also told you that Louisa had said that she was bleeding profusely and needed to go home. Clare formed the view that given the way that Louisa was standing, she believed that she was sore.*

*You also heard from Danny that when she cuddled into him on that couch, she was crying and sobbing. She said, "It hurts, Danny, I want my mum". He told you that later that morning while Clare was confronting the defendant, he sat with Louisa and he cuddled her as she cried. Now you know that the defendant says that all that occurred was consensual oral and vaginal sex.*

*The law allows you to hear about these earlier statements and the behaviour in order to assist you to assess whether in fact Louisa has made up the events. The earlier comments that she made to Danny and the disclosure that she made to Clare show consistency in her allegations and you can use them as evidence that the events happened.*

*However, it is important to remember that of itself repetition does not necessarily make something true. An untruthful person might continuously repeat the same lie and a mistaken person believing themselves to be correct might continuously repeat the error. So too of course might a truthful person repeat her complaint. It is a matter for you to decide whether these earlier statements assist you here. They are there to be considered as evidence, along with everything else.*

In a small number of the summings-up from the principal research the judge told the jury that a person may repeat a lie but that does not make it true, and did not balance that direction with a statement that a true complaint might be repeated too. For example, in the *Masters* summing-up the judge said:

*I now want to discuss with you the evidence about what Ms Gregory told her friend, Jacinta and her flatmate, Carrie on the Sunday morning. The critical pieces of evidence are that she told both that she woke to find Darryl having sex with her. You need to very clearly understand why you heard this evidence and what it is relevant to. It is evidence you can use in deciding whether Ms Gregory has given a consistent account of events. So it is evidence that can help you decide whether you believe her or not when she says she was asleep when sex took place. It is relevant to the suggestion by the accused that she has made this up or invented that part of her account of events.*

***But repeating an untruth or a lie over and over again cannot somehow or other make it true. If she was lying about this aspect to her friend and to her flatmate she is still lying about it to you.***

*Now the Crown say this evidence helps your assessment of Ms Gregory's credibility and reliability. Soon after, she told two others, she was asleep when sex took place. It helps you [the Crown] submits in rejecting the accused's contention that she has made up her claim that she was asleep.*

*[Defence counsel] submits that this aspect was a lie then and is a lie now. She regretted she had sexual intercourse. She was distressed she had to get the morning-after pill. She was worried George with whom she was still in some sort of relationship should find out that she had sex. She could not cry rape in any sort of violent sense so she made it look like it was not her fault by saying that she was asleep. Having told her flatmate and friend she was stuck with it. It was somewhat at their suggestion and encouragement that she went to the police. By this stage she simply could not back out of her story.*

While the judge went on to summarise the prosecution and defence views of the evidence, in our view, this warning lacks the balance necessary (and found in other directions, such as *Kata* above) to allow the jury to use the evidence appropriately, including if they conclude that it is truthful. If repetition warnings are retained, we recommend that they be used in a way to make it clear to juries that both lies, and the truth, may be the subject of repeated complaint or discussion.

The principal research included a further case where the direction to the jury mis-stated the law about the use to which the evidence could be put. In *Smythe* the judge said:

***Now, I must give you a direction on evidence of complaint. You have heard evidence from some witnesses, Mr R was one, as to what the complainant said to the witness about what she claimed evidence. That evidence is not evidence of the truth of what she claimed. It is placed in front of you, that is what she said to others about it, so that you can make an assessment as to how promptly she complained, how consistent she was in making the complaint. It may or it may not assist, it is not evidence of the [truth] of her claims, it is simply a means by which you may judge or that might assist you judging her consistency.***

As this case is from 2012, we consider it likely that this direction simply represents an oversight as to the development of the law under section 35, rather than a systemic issue.

### ***Myths about false allegations***

Where defence counsel sought to emphasise a delay in the complainant reporting the rape, it was often on the basis that this delay made it more likely that the complaint was false. However, claims about false allegations were also raised as discrete aspects of defence narratives.

### **Rape is a claim easy to make but hard to prove**

The claim that rape is an allegation easy to make, but hard to disprove is usually traced to the 17th-century lawyer, judge and jurist, Sir Matthew Hale. The original claim was published posthumously in his three-volume work on criminal law entitled *Historia Placitorum Coronæ: The History of the Pleas of the Crown*. In full, it reads:<sup>54</sup>

*It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.*

The claim has had a long-lasting and practical influence on the development of legal thinking about rape in common law jurisdictions.<sup>55</sup> Its influence has persisted, despite evidence about the inaccuracy of the claim.<sup>56</sup> In fact, there are several problems with the claim. While the initial accusation might be one “easy” lie (a variant often relied on in our sample of closings), it is clearly not the case that being a complainant in a sexual assault trial is “easy”. In a 2009 report commissioned by the (then) New Zealand Ministry of Women’s Affairs, researchers interviewed 58 victim/survivors and analysed surveys completed by 17 victims/survivors. All victims/survivors had disclosed a rape or sexual assault to police, a support agency or a professional any time from the year 2000.<sup>57</sup> Fourteen of these victims/survivors gave evidence in court and were asked how this experience had affected them. All of the responses were negative, with terms such as “embarrassing”, “degrading”, “nerve wracking” and “traumatic” arising.<sup>58</sup> While there have undoubtedly been improvements within the criminal

54 Sir Matthew Hale *Historia Placitorum Coronæ: The History of the Pleas of the Crown* Volume 1 (1736) at 635.

55 Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, London and New York, 2005) at 17.

56 At 18.

57 Venezia Kingi and others *Responding to sexual violence: pathways to recovery* (Ministry of Women’s Affairs, Wellington, 2009) at ix.

58 At [7.3.2].



justice system in terms of supporting the needs of complainants and victims/survivors, it is not yet the case that there is a genuine victim-centred criminal justice process.<sup>59</sup>

The difficulty of the process, and of the complainant giving evidence and appearing in court, was reflected in the prosecution closings in both studies. For example, in *Buchner* the prosecutor referred to the complainant's own evidence about the difficulty of the process and of making the initial disclosure:

*Her being cross-examined about going to the police, I'm not sure if you recall that passage but there was challenge to her about going to the police and the time that it took her to go to the police. Well, I ask you to try and reflect back to what she was actually like in the witness box when she talked about that. You may recall that she described how hard that was. What a big call that was. What a significant thing it was for her to do. A hard, hard choice to make. Not one entered into lightly. You've heard that she's an intelligent woman. I suggest you would know that she would be challenged, criticized, et cetera, for her own conduct through the Court process. Why go to the police and have to explain those very personal, private things? Why come before the 12 of you and have to talk about those very personal, private things? And what she's really saying to you in her answer to [defence counsel] is, "I delayed in terms of going to the police because it took me time to deal with it and to get the courage to come along and say it. Because it's not easy. The reason I've said it is because it's happened and it's happened the way that I've described".*

In addition to the falsity of the idea that making an allegation of rape is "easy", the claim that "rape is an allegation which is easy to make and hard to disprove", mis-states the burden of proof. It is not for the defence to disprove such an allegation, but rather for the prosecution to prove beyond reasonable doubt. It is also contrary to knowledge about attrition rates through the criminal justice system. In 2009, a study of attrition in relation to adult sexual violation cases found that the conviction rate for sexual violation was 13% based on all reported cases.<sup>60</sup>

In 13 of 30 of the principal research cases and four of 10 Pilot cases, the claim was made in closing that rape is a claim easy to make, but hard to disprove.

In three of the principal research cases were specific statements to the effect that rape is an easy allegation to make, but difficult to defend. In the following closing statement defence counsel claimed that they were **not** saying or implying that women make false allegations or cry rape easily in all cases, but only in this case:

59 Louise Ellison and Vanessa E Munro "Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process" (2016) 21 International Journal of Evidence & Proof 183 at 200.

60 Sue Triggs and others *Responding to sexual violence: attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, 2009) at vii.

*Now I want to make it clear that I am not suggesting or implying in any way that wom[e]n make false allegations or cry rape easily, not at all. But the fact that is particularly in this case the fact is that allegations of rape quite often are easy to make and almost impossible to disprove that it had – to disprove that allegation because in this case all that the accused can do is say again and again in his interview, “No I did not rape her”, he was so desperate that he even asked [Detective], “Do you believe me?”*

In that case, the defence counsel was making the point that there was no independent evidence that corroborates the complainant’s account of rape, and therefore it was impossible to disprove. However, the absence of independent corroboratory evidence is hardly particular to this particular trial. In fact, one of the difficulties inherent in this area of the law is the lack of independent evidence, where credibility of the complainant is emphasised. This underpins the entire second part of the claim, that it is “impossible to disprove”. In fact, the law has developed to recognise that there is often no independent evidence available in cases of sexual assault, so that corroboration of the complainant’s story is no longer required for a guilty verdict (see below for further analysis of corroboration).<sup>61</sup> Moreover, the criminal standard of beyond reasonable doubt adds another measure of protection. It is the prosecution that is put to the proof, rather than the defence disproving the allegation.

Despite the defence counsel’s clear disclaimer in the above example that they were not seeking to rely on a general idea about the believability of rape claims, that is exactly the correlation the jury was invited to make.

More common than a direct statement that “rape is easy to claim and hard to disprove” was a general insinuation or a defence theory that the complainant had made a false claim in this situation. Often this was based on a claim that the complainant had made one small lie (i.e. that it was rape, or that she had not consented), and that it was impossible to step back from that story once the police were involved, or once other people became invested in the story (such as friends or parents). This example from a Pilot case:

*How hard would it be, how hard would it be for [the complainant] to say, “Jude, look it wasn’t rape, I can remember, I’m just a bit embarrassed”. “Kylie, Mark, I don’t want to go to the doctor, I don’t want to go to the police station because I know, I went along with this. It’s just one of those things, I’m really embarrassed, I’m sorry.”*

*Then it got harder and harder and this train of allegations that I’ve been mentioning has actually got faster and faster. The police get involved, statements are taken, support people come along. Everyone is supporting her, the learned*

61 Section 121 of the Evidence Act 2006

*Crown prosecutor is supporting her, the Court system is supporting her. The police are supporting her. How hard must it be for her to say, “No, please stop, please stop”? And the shame and the guilt continue, these walls are not broken down yet.*

In some cases, defence counsel were at pains to point out that although the complainant may now believe she had been raped, this was not necessarily the case. In *Carter* defence closing, counsel said:

*And you may think that once she had made a complaint to the police there was really no going back, no room to change her opinion, no room to accept that her behaviour and actions led Zachery to believe that she was up for it. She has too much invested in her account to acknowledge that she may be wrong ...*

*Nor is it for the defence to suggest a motive to lie, mislead, exaggerate or misinterpret events on her behalf. In fact, the defence says she probably now believes the truth of her allegations in the way that she has expressed them in the evidence.*

In this way, while defence counsel was not necessarily accusing the complainant outright of lying, the same underlying theme, that it is an easy claim to make that then takes on a life of its own, comes out.

Another variation was predicated on the initial complaint being made, or initiated by someone other than the complainant, with the complainant being unable, or unwilling, to retract that statement. In another Pilot case, the defence theory was that a false claim initially made by the complainant’s friend “snowballed” and was “blown out of proportion”. In that defence closing, there were seven separate references to the idea that there was one “easy” lie made about the sexual contact being consensual, but that once made, it proved almost impossible to retreat from. In fact, in one long passage, defence counsel said:

*Now, members of the jury, just because someone makes an allegation of rape or sexual violation, it doesn’t make it true, and I just need to tell you a few things about that. Yours and my knowledge of human nature, which is very important in your decisions that you make, will tell you that people lie about allegations like this up and down this country, every week in trials. And sometimes they tell the truth too. Let’s just be human about it. But they also lie, members of the jury. People lie. That’s what humans are like, and they lie about allegations like this.*

*Now sometimes, members of the jury, we can find a motive, sometimes it’s just regret, sometimes they want to get the person back for some reason. Sometimes people want to get custody of the children, sometimes they want to get money. I don’t know. There’s hundreds of reasons potentially that goes on in somebody’s head of the people that do lie as to why they might make up something like this.*

*The point I'm really making though, members of the jury, is that – what I started with, an allegation made doesn't make it true. People lie about allegations like this for all sorts of reasons, and sometimes we can't see the reasons in the evidence and it's very difficult, as you can imagine, because we're trying to look into somebody's head as to why they might be making something up. And sometimes you have a case where you can see some evidence as to what might be the reason, and it's important to know that I don't have to point out any motive to lie. I don't have to show you anything. There's no onus on the defence at all, but it's actually quite fortunate in this case that we do have some things that look overtly like motives to lie and I've pointed them out already.*

*She doesn't make the allegation, members of the jury. There's embarrassment, there's regret; who knows. There's some things there that might be the answer, but we just don't know. The point being though don't just take this just because an allegation has been made it's therefore true, because allegations are made up. That's just life.*

A similar narrative is found in the *Langley* defence closing:

*Now the next matter is that with all this in the background about this complaint that's been made and its own internal conflicts, you then have the rather unfortunate fact that the prosecution can't escape that the complainant was compelled by her husband to make a complaint. Literally, driven to make a complaint by her husband. Physically driven to make a complaint to a police station and threatened that if she didn't do so, he would kill Mr Langley. After she was driven to make a complaint and compelled to make a complaint, that complaint was recorded on digital video disc at a police station and you might think, not something which is easily retracted.*

While both these closings included overt claims by the defence that the complainant was lying because she had not initiated the first report to the police, or had been compelled to, the same underlying myth that true victims of rape always report to the police at the first possible moment was the basis for other, more oblique comments. For example, in the Pilot case of *Cropp*, defence counsel said:

*And then the train of allegations starts. Now somewhere along the line she talks to Kylie about it and who do you think the driving force is to go to the police? Certainly not Ms Downley, certainly not Ms Downley. It's not her decision. "Wasn't my decision," that's on page [ ] of His Honour's notes, "Wasn't my decision." Do you think if it was her decision she'd have gone to the police? And if she didn't go to the police, is the reason behind that because she knew in her heart of hearts it wasn't rape.*

Again, the reason for making this point in closing is to contrast the complainant's approach in this case with the theoretical "real victim" who immediately makes a formal complaint to police.<sup>62</sup>

The submission that a complainant had got together with another witness and manufactured evidence was dealt with by the judge in *Satae*:

*[Defence counsel] said to you that those two factors are critical and in effect he is suggesting to you that they are matters you simply cannot rely upon because she did not say anything about either of those two things when she was interviewed. [Defence counsel] also suggested to you that not only had Ms Williams and the complainant been talking but he implied very strongly that in fact they have put their heads together to decide what evidence they were going to give.*

*That of course is a submission that you are entitled to consider, but please do not speculate. It was never suggested to the complainant that she and Ms Williams had got together to manufacture evidence. I suggest you simply deal with the evidence that you have as opposed to any speculation.*

### Closings expressly based on the narrative that the complainant had made a false complaint

In some cases, the defence theory was that the complainant had initially consented to the sexual intercourse, but later regretted this consent and sought to cover it up.<sup>63</sup>

The myth that false complaints are common in rape cases remains entrenched in New Zealand society. In the recent *Gender Attitudes Survey*, 29% of respondents agreed that "false rape accusations are common". A further 26% were "neutral" on the statement, with another 18% responding that they did not know. That means that only 26% of all respondents disagreed with the statement.<sup>64</sup>

In other cases, while this was not the basis of the defence, defence counsel referred to the possibility that the complainant had made a false complaint for some reason. Of course, where there is a complete discrepancy between the complainant's and defendant's accounts, defence counsel must be able to comment on this, and draw out the differences. However, as the response from the *Gender Attitudes Survey* outlined above indicates, a suggestion of a false complaint of rape may be likely to resonate with members of the jury more

62 In fact, recent figures suggest fewer than 10% of sexual offences are reported to police Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (Ministry of Justice, Wellington, 2019) at 32.

63 See further Chapter Seven at 297 and Chapter Eight at 343.

64 National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) <https://genderequal.nz/ga-survey/> at 22.

than a similar suggestion of a false complaint of a different crime (such as burglary). While it is necessary for defence counsel to draw attention to differences between the complainant's account and the defendant's, we are of the view that they should do so based on the specific evidence in the case, rather than referring to or reinforcing a generalised myth that it is common for false complaints of rape to be made. However, in our research a number of cases were expressly run as "false complaint" cases in the defence closings (10 principal research cases and four Pilot cases). In one of these cases, *Smythe*, the defence argument that this was a false claim was present from almost the beginning of the closing statement:

*I accept that there must be an accounting for the events of the [date] and [date] but my argument to you is that the wrong person has been called on to account and I say to you in all sincerity that my submission to you is that Dani Kavka should have been charged with making a false complaint, because my argument to you is that that is what she has done. Being embarrassed doesn't cut it. Not wanting people to know doesn't cut it. Trying to keep her boyfriend doesn't cut it. Being trapped or pressurised by a boyfriend, family, ... doesn't cut it. She shouldn't have lied, she shouldn't have lied to any of us, she shouldn't have lied on oath, she shouldn't have sacrificed Alex Smythe in order to survive the consequences of the mistakes that both she and he made that night.*

In this case, the complainant, Dani, and the defendant, Alexander, were fellow employees who had been out drinking together. Dani alleged that at the end of the evening she went home, Alexander coerced her into letting him stay, and then raped her. Alexander claimed the sexual intercourse was consensual. This case included evidence from Dani's friend Olivia, who said she walked into the room while the alleged rape was occurring, and saw Dani's arms and legs wrapped around Alexander. While under the terms of our access agreement we did not have access to Olivia's evidence, it was referred to in the defence closing. Olivia said she asked Dani "are you all right" and Dani turned her head away. The defence closing reported that Olivia had reacted strongly to being asked whether she had seen a rape in progress and that she replied "Yeah, I reacted strongly because I don't think it [was]."

This evidence was also referred to by the prosecution in closing, who reiterated that when cross-examined about what she could have done when Olivia came in, Dani replied that she was embarrassed, that she'd tried to fight Alexander off but then she froze and essentially could not believe what was happening to her.

In these circumstances, the complainant had given reasons for her reaction, a reaction that is consistent with what we know about how victims behave during sexual assault.<sup>65</sup> However, if the jury did not believe her explanation (which itself raises problems about the subtle ways in which myths about the way in which a “real victim” would behave), there was arguably an evidential basis for the defence to argue this was consensual sexual intercourse based on Olivia’s account.

This case demonstrates the way in which different ideas about rape and victim behaviour can be layered in one situation. Here, defence counsel made an overt claim that there was a false allegation in this case. There was arguably a factual and evidence basis for the defence to claim that the complainant was making a false complaint. This narrative would rely on the jury rejecting the complainant’s explanation that she froze when Olivia walked in on her and that this was the reason that she did not immediately alert her to the fact she was being raped. However, if the jury did reject the complainant’s account, they may have been influenced in this conclusion by the erroneous idea that all rape victims would fight back, or struggle.

This case also demonstrates the difficulty in this type of analysis. It is necessary for defence counsel to be able to effectively defend their clients and to raise scenarios or situations that are open on the evidence. However, where these scenarios are themselves based on contestable views of how women generally behave, or complainants act, at the least, there needs to be a recognition of this and an attempt to have the jury consider the basis on which to make their decision. In the *Smythe* case, ideally there would have been a direct reference by the judge to the complainant’s evidence about freezing, and a direction that different people react in different ways to situations such as this (see further below).<sup>66</sup> This would have at least alerted the jury to some care in their decision-making on this point, but still allowed the defence to present their interpretation of the evidence.

In *Nash*, defence counsel began their closing statement by saying:

*As a woman, I can’t fathom why someone would make up an allegation like this. But the defence is saying that that is exactly what has occurred. I said at the beginning of the trial that Mr Nash had been waiting for a year and half for his name to be cleared, and that is now your job, and find him not guilty of these three crimes that he’s been accused of.*

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65 See for example a 2017 Swedish study of 298 women who had visited an emergency clinic for raped women within a month of a sexual assault, which found seven out of 10 of these women experienced “tonic immobility”. This was described as an involuntary, temporary state of motor inhibition in response to situations involving intense fear (e.g. “freezing”): Anna Möller and others “Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression” (2017) 96 Acta Obstetrica et Gynecologica Scandinavica 932.

66 At 464.

To the extent that many of these cases are “she said, he said” cases, then often the defence case will implicitly rest on the basis that the complainant’s account is false. However, if it is just a matter of testing the complainant’s credibility, the same effect could be achieved by pointing out inconsistencies in the complainant’s story, or between the complainant’s evidence and other evidence. This does not mean that defence counsel cannot point out that the complainant may have a motive to lie, or might be making the allegation up, if that interpretation is available on the evidence. However, when defence counsel systematically refer to the complainant’s account as a “false complaint” or a “false allegation” they are (perhaps unwittingly) seeking to reinforce any previously held beliefs that false complaints in rape cases are common (beliefs that are perhaps reinforced by media stories such as the recent headline “Worker told to drop dispute or face false rape claim”).<sup>67</sup>

It is necessary for the defence to be able to test the complainant’s credibility, but focussing on the specific evidence in the case accomplishes that objective, without reinforcing or relying on the general idea that women commonly lie about sex and rape. As the necessary testing of the complainant’s evidence and the credibility of her account can be accomplished by reference to the specific evidence in the case, without reference to the false underlying premise, it is our view that this type of characterisation needs to be addressed by judicial direction to the jury.

In the closing from a Pilot case, defence counsel argued that false claims about rape are endemic in New Zealand, and that these false claims persist right through to trial:

*Now, members of the jury, just because someone makes an allegation of rape or sexual violation, it doesn’t make it true, and I just need to tell you a few things about that. Yours and my knowledge of human nature, which is very important in your decisions that you make, will tell you that people lie about allegations like this up and down this country, every week in trials. And sometimes they tell the truth too. Let’s just be human about it. But they also lie, members of the jury. People lie. That’s what humans are like, and they lie about allegations like this.*

While it seems unlikely that people lie about rape allegations “up and down this country”, we do not have an accurate understanding of the level of false complaints of rape made in New Zealand. In the most recent statistics concerning reported sexual violence victimisations in the criminal justice system, on average 8% of all reported sexual violence victimisations were reported as being “no crime” over a four year period, with a drop to 2% in 2018.<sup>68</sup> This category included, although was not limited to, situations where the person reporting the

67 “Worker told to drop dispute or face false rape claim” *Otago Daily Times* (online edition, Dunedin, 28 June 2019) <https://www.odt.co.nz/news/national/worker-told-drop-dispute-or-face-false-rape-claim>

68 Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Wellington, 1 November 2019) <https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf> at 3.



crime admitted making a false report, or where there was evidence to suggest a false report had been made.<sup>69</sup> If these cases of false reports are being identified and removed from the system *before* they get to trial it does tend to suggest that there is not a raft of people in trials “up and down the country” lying about such allegations. However, this comment by defence counsel, and the fact that it was not addressed by the judge, does indicate the need for closer judicial control of statements such as this and indicates a potential double standard. A recent case demonstrates that, at times, people who are guilty are acquitted of rape.<sup>70</sup> However, it would be inappropriate for the Crown to make a broad statement to the effect that guilty men are often acquitted of rape.

Some defence counsel also sought to rely on the effects of a false allegation of rape. In the *Masters* defence closing, counsel said:

*Whatever you might make of the plight of Nadine Gregory, the complainant in this case, just ask yourselves members of the jury what could be worse than to be falsely accused and arrested and wrongly convicted? What could be worse?*

In closing, the judge addressed the question of whether the complainant may have lied:

*Now an example of this lies in the question that some of you may have asked yourselves. Why would Ms Gregory lie about this if it were not true? That is not a correct approach because it suggests that the accused has some responsibility of showing why she might lie. Applying the onus of proof, which I have just told you about, and the standard of proof which I will come to next, applying these correctly the true question is has the Crown proved the essential truthfulness of her account of events beyond reasonable doubt?*

In the *Perez* summing-up, the judge had this to say about false allegations:

*The starting point is the presumption of innocence. You must treat the defendant as innocent until the Crown has proved that he is guilty. The burden of proof or the onus of proof or the job of doing the proving is on the Crown. It stays on the Crown from beginning to end. There is no onus on the defendant at any stage to prove his innocence. The presumption of innocence means that he did not have to give or call any evidence. The fact that he did not give evidence does not add to the case against him in any way. It is for the Crown to prove his guilt. He does not have to prove anything.*

69 Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (Wellington, 1 November 2019) <https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf> at 25.

70 Following a trial in 2011, the defendant was acquitted of rape. Subsequently he admitted the offending and a retrial has been ordered (details suppressed at the time of writing).

*That all sounds simple enough but it is easy to subtly lose sight of that and let me give you an example. [Defence counsel] suggested both to Ms DeSouza in cross-examining her and to you yesterday that Ms DeSouza might have made up a false allegation against the defendant to explain to Keith why she would have a sexual encounter with another man. [Defence counsel] also suggested to you that maybe she made this up because she was angry at the defendant and how he had treated their date. Maybe she made this up because she didn't want her sisters to know what she had been up to.*

*The defence are perfectly entitled to explore all of that. The defendant is entitled to suggest possible motives or reasons as to why Ms DeSouza might have made up, he says, this allegation. But he does not have to offer any reasons or motives for her to do that. The fact that he has offered reasons or motives does not change anything. It is not his job to demonstrate that the allegation is false. It is the Crown who have to prove that it is true. The Crown has to prove that the defendant is guilty beyond reasonable doubt.*

This is undoubtedly true in law. But, in our view, it does not go far enough. Having brought the issue of the false allegation to the jury's attention, the judge should have gone on to direct the jury that they should not speculate about why, or how often people make false allegations, but rather focus on whether, in this case, the prosecution have proved the allegation is true. In fact, as the prosecution correctly pointed out in their closing statement, in this case the defence's theory that the complainant was lying did not really match the evidence. The complainant had given her boyfriend an alternative explanation about why she was upset, which he had accepted. On those facts, there was no need for her to say anything about the rape as her boyfriend did not have any suspicions that needed to be allayed. By telling the jury that the defence was entitled to explore the possibility of false complaint without also addressing the undeniable element of myth that can be present in this area, was, we think, unhelpful.

### **Corroboration of the complainant's evidence**

As a general rule, it is not necessary for evidence on which the prosecution relies to be corroborated (section 121 of the Evidence Act 2006). However, this rule is a relatively recent development for sexual offences, with common law requiring the judge to warn the jury that it is dangerous to act upon the evidence of a complainant in cases of sexual offences unless that evidence was corroborated.<sup>71</sup> Juries were informed that it would be dangerous

<sup>71</sup> Warren Young *Rape Study Volume 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983) at 137.

to convict on the uncorroborated testimony of a particular witness, but were also told that a lack of corroboration is not decisive.<sup>72</sup>

There were two assumptions underpinning the warning regarding the testimony of an alleged victim of sexual assault:<sup>73</sup>

*[F]irst, that there is a substantial risk that the complainant may have made a false accusation due to neurotic fantasy, to spite, or to shame at having consented to the accused's advances; secondly, that it is difficult for a jury to assess the seriousness of this risk because the complainant may appear sincere and plausible and because the circumstances of the alleged offence, especially when children are involved, may create strong prejudice against the accused.*

The first assumption, that women routinely make false accusations, has been discussed immediately above, and is clearly still prevalent in trials today. However, the requirement to warn the jury about the absence of corroboration in a sexual case was removed in 1986 when section 23AB of the Evidence Act 1908 came into force. Section 23AB confirmed that no corroboration of the complainant's evidence was required for conviction, and that a judge was not required to give any warning to the jury relating to the absence of corroboration. Shortly after the section was enacted the Court of Appeal commented:<sup>74</sup>

*[I]t is evident that Parliament has taken the view that at the present day there is in general no special danger in sexual cases calling for special caution before acting on the word of the complainant alone.*

However, the Court went on to recognise that the section left the judge free to comment on the absence of supporting evidence if the particular case called for such comment.<sup>75</sup> In other words, section 23AB did not prevent a judge from giving such a warning (or for defence counsel commenting on the lack of corroboration or the erroneous assumptions underpinning it).

72 Warren Young *Rape Study Volume 1: A Discussion of Law and Practice* (Department of Justice, Wellington, 1983) at 137; Gerald Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 *New Zealand Universities Law Review* 97 at 111–112.

73 AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 159; see also Elisabeth McDonald "An(other) Explanation: The exclusion of women's stories in sexual offence trials" in *New Zealand Law Society Seminar Challenging Law and Legal Processes – the development of a feminist legal analysis* (NZLS, Wellington, 1993) 43 at 45–49.

74 *R v Daniels & Tihi* [1986] 2 NZLR 106 (CA) at 111.

75 At 111.

Section 23AB was re-enacted as part of section 121 of the Evidence Act 2006, which states:

### 121 Corroboration

- (1) It is not necessary in a criminal proceeding for the evidence on which the prosecution relies to be corroborated, except with respect to the offences of –
  - (a) perjury (section 108 of the Crimes Act 1961); and
  - (b) false oaths (section 110 of the Crimes Act 1961); and
  - (c) false statements or declarations (section 111 of the Crimes Act 1961); and
  - (d) treason (section 73 of the Crimes Act 1961).
- (2) Subject to subsection (1) and section 122, if in a criminal proceeding there is a jury, it is not necessary for the Judge to –
  - (a) warn the jury that it is dangerous to act on uncorroborated evidence or to give a warning to the same or similar effect; or
  - (b) give a direction relating to the absence of corroboration.

Section 121 does not prevent a warning being given, although the incremental legislative reforms indicate caution should now be taken when deciding to give a warning in such cases:<sup>76</sup>

*Parliament has indicated that beliefs which perpetuate the notion women are prone to fabricate complaints of rape ... are unacceptable in the courtroom today.*

Perhaps unsurprisingly, therefore, corroboration was not a major feature of the prosecution and defence closings in the principal study, or in the judicial summings-up in those cases. However, it was referred to in a small number of cases. In our view, this was done well in the *Jackson* summing-up:

*Presenting the case for the Crown, [the prosecutor] said to you, as is axiomatic in all cases of a sexual nature of this kind, that if you are going to convict the accused you must be able to believe the complainant. You must be able to believe that the complainant is an honest witness and that she is a reliable witness insofar as she is able to be because, members of the jury, if you can't accept the truthfulness and accuracy of what the complainant says, then you simply cannot convict the accused.*

*That is the case in almost every rape case because it involves things that are going on between people in privacy. There is not generally someone standing by with a video camera and a microphone recording what is going on so that you can take an objective view. You very rarely have any independent observers in cases of rape so you have to be able to rely on what the complainant says. That said, if you do accept what the complainant says, if you are satisfied and you are moved to the*

<sup>76</sup> *R v H* (CA289/95) [1997] 1 NZLR 673 at 694.

*point where you have no reasonable doubt about the matter by the complainant's evidence, then that is all that the law requires. The law does not require that you formally seek corroboration or support for the complainant's evidence from some other quarter. If you believe her, and you are sure that you believe her, then that is a sufficient basis for convictions.*

The fact that no corroboration of the complainant's evidence was required was referred to by the prosecution in four of the Pilot cases. Conversely, the judge did not refer to it in any of the Pilot cases. However, as touched on below, where the judge expressly tells the jury that they are the final source of law, there is a risk that a correct account of the law by the prosecution will not be relied on by the jury. While section 121 says it is not necessary for the judge to give a direction relating to the absence of corroboration, we consider that judges should consider whether a corroboration warning is warranted in summing up if the point has been specifically raised by the prosecution.

One case where the defence came very close to asking the jury to find corroboration for the complainant's evidence was *Masters*, where defence counsel said:

*That when you stand back and you boil it all down, down to its most simple proposition the Crown case against Darryl Masters relies wholly on what the complainant has told you. You take her evidence away and out of this case and there's nothing. It leaves nothing against Mr Masters.*

*I submit that there's no true or cogent independent support in any of the other evidence for what she says. That it doesn't matter what she has told anyone else who then comes along and reports that to you by way of evidence. That's not true and cogent support in my submission.*

In our view, this was an appropriate case for the judge to give a corroboration warning, despite section 121(2) stating that such a warning is not necessary. In this case, the judge told the jury that they were entitled to rely on the complainant's evidence alone to convict. However, the judge then immediately qualified that (correct) statement of law by suggesting that as a matter of "prudence and caution", the jury should look to the other evidence in the case to see if there was anything that tended to support or refute her account:

*I now want to discuss with you a number of aspects of Ms Gregory's evidence. You will all appreciate that your assessment of her credibility and reliability is vital in this case. This is because in the end the only evidence of a lack of a consent to the breast sucking allegation in the first charge and that she was asleep at the time of the penetration of her genitalia by the accused's penis in the second charge is evidence from her. So for you to convict the accused on either of these charges you must be satisfied beyond reasonable doubt of the essential ingredients of the*

*particular charge through her evidence. As a jury you are perfectly entitled to rely on her evidence alone but you may think as a matter of prudence and caution that you should look at all of the other evidence in the case and see if there is evidence that tends to support or refute her account of events. So, although you may rely purely on her evidence, prudence and caution would suggest that you look to supporting evidence.*

Although the prosecution ran their case on the fact that there was supporting evidence for the complainant's account (here, the consistency of the complainant's account as given to her friends and flatmates, the unlikelihood that she would have consensual intercourse without contraception and without other protection and other background evidence), in our view the structure of this warning (also found in another case in the principal research, *Schuette*) is concerning. If a judge correctly tells the jury they can rely on the complainant's evidence and then immediately instructs them to look for supporting evidence on the grounds of "prudence and caution" it comes close to cancelling out the original warning, and, at the very least, sending the jury mixed messages. We recommend that if a direction is given that no corroboration of the complainant's evidence is required, it should not be coupled with a warning to look for evidence in support.

We also recommend that care be taken when summing up about the complainant's credibility and reliability, as demonstrated by the passage from the summing-up in *Walters*:

*So, effectively, it comes back to your assessment of whether or not you accept the complainant's evidence as reliable and credible, and this is because to find him guilty on any of the charges the complainant's evidence must leave you satisfied beyond reasonable doubt that the elements of any particular charge are established. In other words, the Crown case ultimately relies on your acceptance of her evidence. You will, of course, no doubt look for other evidence that tends to support her evidence, and the Crown have submitted to you that there is other evidence that supports her account and lends it at, what the Crown referred to, the ring on truth, and on the other hand the defence, in both the cross-examination of the complainant and in the closing address, submitted that there serious inconsistencies between what she was doing in that house at the time, and what she was saying on Facebook to the defendant and in the days immediately afterwards and what she said to her friends, especially to John immediately afterwards, and the defence say that makes her evidence unreliable and unbelievable, and alongside the defendant's explanation and the defence evidence would leave you rejecting her evidence and finding him not guilty.*

Here, the judge moved straight from noting that the prosecution's case requires the jury to accept the complainant's evidence to instructing them to look for other evidence, without warning them that they were entitled to rely on her evidence alone. This could have been very easily cured by adding something like the statement found in the *Tait* summing-up:

*If, however, you are satisfied and convinced that she is truthful and reliable in what she is saying then the law doesn't require that you cast around for other evidence to support what she says, the law does not require as a matter of law, corroboration or evidence from some other quarter. If you are convinced on the basis of what the complainant says, that she is truthful and reliable then the law is that you can and should convict the accused. There is not a need to, it's a matter of law, seek for support from some outside source.*

### **Myths about a victim's responsibility for the offending/victim-blaming myths**

Apart from section 127 there are no other statutory jury directions that specifically relate to an evaluation of a complainant's behaviour in a case involving sexual violence. In its recent second review of the Evidence Act 2006 the Law Commission suggested the introduction of a new sample direction to address the misconception that a complainant who dresses "provocatively" or acts "flirtatiously" is at least partially responsible for the offending.<sup>77</sup> We support the development of such a direction and consider that it should be framed in a way to allow the judge to comment on any aspect of the complainant's behaviour that the defence tries to rely on as being a contributing factor to the offending. What follows is a thematic analysis of the way in which myths about the complainant's responsibility for, or contribution to, the offending, were both relied on, and rebutted in the closing statements and summings-up in our sample.

### **Complainant's clothing**

In 13 of the cases from the principal research and three of the Pilot cases there was comment by the defence counsel about what the complainant was wearing, or what clothing had been removed. In three of the principal research cases, defence sought to make something from the particular clothing that the complainant was wearing.<sup>78</sup> In *Roberts*, defence counsel noted that the complainant sometimes wore fishnet stockings and bought herself a maid's uniform. Counsel went on to note:

*Now, none of that, none of those last two details, have any relevance in the way that we've seen publicity lately, that women are not allowed to dress the way they want to. Of course, they can. The significance is that these are details about her private life that Callum Roberts knew and that he really shouldn't have known had it not been for the fact that they'd been having an affair.*

<sup>77</sup> New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) Recommendation 22.

<sup>78</sup> See also Chapter Eight at [286](#).

Despite defence counsel's explaining that he was only commenting on these items of the complainant's clothing to show that the defendant and the complainant were having an affair, counsel was also relying on an implicit assumption that a woman who wore fishnet stockings and a maid's uniform was the kind of person who was sexually adventurous and likely to consent to the sexual intercourse on this particular occasion. In fact, the defence counsel's statement that the defendant "really shouldn't have known" about the way the complainant chooses to dress implies that it is a deviant behaviour, and not something she should share or tell others about. If it really was of no relevance, defence counsel should have refrained from mentioning it at all. Additionally, even if the defendant and the complainant were having an affair, information that the defendant has about the clothing the complainant has can hardly be relevant to whether she consented on this particular occasion.

A similar example can be seen in the principal research case of *Schuetze* where defence counsel said in closing:

*How we saw lanthe dressed when she gave evidence was clearly not the way she was dressed on that particular night. Now the fact that she was wearing a skimpy strapless dress and a mini skirt is no invitation for anybody to say right she's on for it, nobody would accept that, she can dress how she likes but I think as a jury, you having heard the evidence, you will have to accept that her behaviour that night was certainly provocative and flirtatious and how a man like Mr Schuetze is able to interpret that, especially with the specific invitation, "Come into the bedroom", I don't know, it's a problem for you to deal with.*

Again, despite defence counsel expressly disclaiming reliance on the myth that women who dress in a particular way are indicating that they consent to sexual intercourse, there is no other reason to bring up the complainant's dress. This submission about the clothing lanthe was wearing as being relevant to whether or not she had consented, was not responded to by the judge in summing up.

*Young* is a similar story, where defence counsel specifically linked the fact that the complainant told the defendant the colour of her underwear to both consent and reasonable belief in consent:

*Who says what colour underwear am I wearing if they are not intending to go a lot further? I suggest to you that that is good for consent and also good for reasonable belief in consent.*

Finally, defence counsel in *Gamage* sought to make much of the fact that complainant was not wearing underwear under her dress:

*[W]e then have this evidence of Ms Taylor presenting at the hairdresser and going back to the shop with Mr Gamage in this pretty slinky green dress with nothing whatsoever by way of underwear underneath. Now please don't think for a moment*



*that I'm suggesting that the way a woman dresses should be suggestive of her inviting or eliciting any kind of sexual advance or assault, that's not the submission that I'm making but her choice of dress that day I would submit members of the jury is relevant. It's relevant because the defence say that right from the very beginning of the [date] Ms Taylor knew that she was going to be having sex with Mr Gamage that day because she'd already agreed to it the day before. It's relevant because Ms Taylor accepted both in her evidential interview and in cross-examination that this was not normal for her. Normally she would wear underwear and in particular it's relevant if you accept Mr Gamage's evidence that when he saw that she was completely naked under her dress he commented on it, he was surprised and she said words to the effect of, "I don't need underwear today because I'm here to have sex with you." So in this case the defence say it is relevant that she wasn't wearing any underwear on this day because the defence say it's entirely consistent with the fact that she'd agreed to and intended upon having sex with Mr Gamage on this particular [date] and it's the defence case that she was the one who gave the green light on that day.*

Although the complainant may not have been wearing underwear on that day, she had explained this as being because her underwear was all in the wash. In any event, the fact that the complainant was not wearing underwear and intending to have sexual intercourse does not impact on her ability to refuse consent later. While these statements might have been open to the defendant to make on the evidence, they do demonstrate the way in which defence counsel are able to build up a narrative of sex rather than rape in their closing statements. The difficulty in responding to this, is that, although based on evidence, there may still be an underlying element of stereotype embedded in the narrative. We consider that the use of counter-intuitive directions, as discussed below, might assist the jury in assessing this type of narrative.

In *Gamage*, the issue of clothing was challenged by both the prosecution in closing, as well as the judge in summing up. The prosecutor said:

*And what about the lack of underwear? The defence may make a lot of that. I suggest it's a red herring. We know, from the dress, it goes down to her feet. It is not revealing. It's not suggestive of anything, with a grey cardigan on top of that. You wouldn't know that she wasn't wearing any underwear. She said that all her underwear was in the wash. Well, we know she's out looking for a job to get money so I suggest that's a valid explanation. It's a valid explanation because it's the truth. Even Mr Gamage said in evidence he was surprised that when the clothes were taken off her that she didn't have any underwear on. He wasn't expecting it.*

The judge specifically directed the jury on this point:

*Now, in relation to the underwear, [defence counsel] wasn't saying that she was dressing provocatively, but it was interesting that she didn't have the underwear on. You might like to consider, there's a passage of evidence, it's page [ ] line [ ], ladies and gentlemen. That was put to Kelly by [defence counsel] about the underwear and Ms Taylor gave an answer which you might think is slightly indicative of her naivety. It's a matter entirely for you, but you might think it's quite a naïve explanation as to her view of what the accused may or may not do.*

By directing the jury back to the evidence, the judge got around the fact that defence counsel had loudly avowed not to be relying on any sort of outdated stereotype in raising the evidence. However, in our view, the judge should still give the sample direction suggested by the Law Commission, and explicitly tell the jury that a complainant who dresses “provocatively” is not at all responsible for the offending, and does not invite it in any way. The *Crown Court Compendium* (E & W) contains a relevant direction where clothing worn by the complainant is said to be revealing or provocative and suggests a judge says:<sup>79</sup>

*You must not assume that W was looking to have sex or willing to have sex if the opportunity presented itself because of the way W was dressed. Just because someone dresses in revealing clothing it does not mean that they are inviting or willing to have sex. It also does not mean that someone else who sees that person and interacts with them could reasonably believe that that person would consent to sex simply because of the way they are dressed.*

We consider that if the sample direction is adopted in New Zealand, it should be wide enough to encompass the effect clothing should have on both consent and reasonable belief in consent. Despite the focus by the prosecution, defence and the judge on the evidence in the case in *Garage*, and the complainant's explanation, there is a risk that without a “myth busting” direction from the judge, the continued reference to her clothing would arouse in some members of the jury an erroneous assumption about her actual consent at the time of the alleged offending.

### Complainant flirting or being affectionate

The closing statements of defence counsel exhibited a number of devices which we argue were used to “normalize rape into sex”.<sup>80</sup> For example, rather than focussing particularly on the sexual history of the complainant (as discussed in Chapter Five), defence counsel sought to make something from the fact that the complainant was flirting, acting affectionately

<sup>79</sup> Judicial College *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf> Example 8 at 20.7.

<sup>80</sup> Clare McGlynn “Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence” (2017) 81 *The Journal of Criminal Law* 367 at 371, citing Aileen McColgan.

or otherwise demonstrating an interest usually, but not always, in the defendant. We would argue that this tactic was another example of the defence seeking to convince the jury that what was occurring in the circumstances surrounding the alleged rape was normal, everyday sexual behaviour, rather than rape.

In 13 out of the 30 principal research cases the defence noted or alluded in the closing statement to the complainant flirting, or acting affectionately. On most of those occasions the reference was to the complainant's behaviour with, or towards, the defendant. In four of the 10 Pilot cases, a similar argument was made. One such example is from the *Buchner* closing defence statement:

*Anthony Buchner went with her and you know that she seemed to be all over him in town, leaning on him that sort of stuff, hugging him at one stage so he appeared to be maybe the centre of her attention if you were to look at it from an outsider's point of view.*

While it might be argued that evidence of flirting might be relevant to reasonable belief in consent (and potentially consent), the focus still needs to be on the time of the sexual activity. Factors in the lead-up may be relevant, but are not determinative. To support juries in drawing this distinction, we consider that judges should be able to give a direction along the lines of the Law Commission's recommended sample direction addressing the myth that a complainant who acts "flirtatiously" is at least partially responsible for the offending. While this would allow defence counsel to refer to such evidence as part of the narrative, it would also give the jury some direction about the meaning to take from the evidence.

### **Place or time or some consensual sexual activity on the occasion of the alleged offending**

We recommend that if the Law Commission's sample direction to cure any misapprehension that the complainant is responsible in any way for the offending is adopted, it is wide enough to encompass broader ideas about the complainant's behaviour as being a contributory factor to the offending. In 13 of 30 principal research cases, defence counsel sought to make something of the place that the complainant and the defendant were in before the alleged rape occurred. In seven of those cases, the fact that the complainant and the defendant were in a bed, or in a bedroom, was emphasised. The most overt example of this was in the *Carter* defence closing, where defence counsel referred to the complainant and the defendant being in the bedroom together and, in particular, on seven different occasions the complainant inviting the defendant into the bedroom or being on the bed together:

*Why else retire to the bedroom together? Why shut, and she did it, shut the door behind them? I'll come to the dog shortly. Why lie on the bed? Why not sit on the bed if you're just going to have a casual chat? ....*

*Even more perplexing, why take him to the bedroom rather than hanging out in the living area of the house? ...*

*Are you convinced that the reason why she led him to the bedroom was because her flatmate was having a conversation, a private conversation, with this Polynesian guy that she'd never seen before? Does that really wash, particularly when she said that she thought he was preparing to leave? If she truly didn't want to engage in intimacy, why take him to the bed, to the bedroom? There are no chairs there to sit on and have a nice chat and a cup of tea. There's only a bed. She knew that. Why shut the door? She says to keep the annoying dog away. I suggest quite the contrary, it was to give them privacy, and I'll come back to the dog shortly ...*

*He lay down on the bed first, according to her. What did she do? She didn't sit on the other side of the bed by the suitcase. She lies down beside him ...*

*She says, "Well, I shut the door because the dog eats everything." She hadn't even seen the dog. We don't even know whether the dog was there. I suggest she has invented that as an excuse, as a scenario, to explain her shutting the door because that's giving a signal to the accused, "Listen, we want some privacy. We're in the bedroom." ...*

*By taking Zachery into the bedroom, I suggest that was a significant signal to him that she was interested in sexual intimacy with him despite her saying that that wasn't going to happen earlier ...*

*Really, it's, when you look at the whole scenario, the invitation into the room, why she behaved in the way she did ...*

In this case the complainant (Theresa) and the defendant (Zachery) met through an internet dating site. Theresa alleged that on a date Zachery suggested sexual intercourse and she declined. Theresa later initiated sexual contact, but said she had no intention of sexual intercourse. She alleged that despite her protests, and despite saying "no" a number of times, Zachery forcibly penetrated her. In this context, we accept that there is some relevance to the point made by defence counsel that the complainant and defendant were in the bedroom together. However, the repeated reference to inviting the defendant into the bedroom and them being on the bed risks reframing the question from "did she consent at the moment of penetration?", to inviting an inference that because she consented to other sexual activity she must also have consented to intercourse.

We accept that in some cases it might be relevant to a reasonable belief in consent if a complainant prior to the act of sexual intercourse, indicated willingness to engage in sexual behaviour. However, to phrase such conduct by asking: "If she truly didn't want to engage in intimacy, why take him to the bed, to the bedroom?" takes a potential legitimate enquiry and turns it on its head by implying it was the complainant's fault, or own unreasonable explanation that led to the alleged rape. In addition, it is not in every case that such conduct

will be relevant to the existence in a reasonable belief in consent (or the existence of consent). In this case, the complainant's evidence was that she had said or indicated no at the time of sexual intercourse. The prosecutor clearly anticipated that the defence would raise the relevance of the prior sexual contact and sought to ensure the jury focussed on its relevance for the issues of consent and reasonable belief in consent:

*And in effect the defence is just saying because she took her pants off and engaged in consensual touching what did she expect was going to happen? And I think he even said that at [page]. "I mean what did she think was gonna happen if she took her pants off with me?" But that's not equal to consent. Consent isn't if somebody's taken their pants off that gives consent to the other person to do what they like to them.*

*Now his reasonable belief and consent has to be assessed at the time the penetration occurred. Not beforehand when they were fondling and not after. And that makes sense doesn't it? Because if it can't be assessed at the time the penetration occurred then our law would say that nobody can ever say, "no" once you've started something and that's not what our law says.*

In a different case in the principal research, a comment made by counsel in closing the defence case is a further illustration of a situation where counsel has gone beyond the bounds of what is necessary to run a narrative leading up to consent:

*Now taking a male back to your place alone naturally raised eyebrows as to what could happen; I'm not trying to be too sexist here but that's just natural human common sense. (Tait)*

In this case the complainant and the defendant were socialising with a mutual friend in a bar. Jesse asked Zoe if he could stay at her house because he had nowhere to sleep that night. Zoe agreed and at the end of the evening they went to her house together. Zoe was heavily intoxicated but remembered making up the couch for Jesse to sleep in. Given the complainant's perfectly reasonable, and rational explanation for "taking a male back" to her place, the only reason for the defence counsel to make this comment was to try to bring the narrative away from rape, to sex, and to play on the, perhaps unconscious, beliefs that she must have been asking for it.

*The Crown Court Compendium* includes a sample direction that is at least partially on point here, as it encompasses situations where some consensual sexual activity occurs just prior to the alleged offence. It also includes comments that:<sup>81</sup>

81 Judicial College *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf> Example 10 at 20.8.

*[I]t is important that you realise just because V let D into his/her home and willingly engaged in kissing D, this does not mean that V must have wanted to go on to have sexual intercourse and must have consented to it.*

*[Y]ou must not assume that because V had been kissing D willingly before sexual intercourse took place this in itself gave D reasonable grounds for believing that V consented to having sexual intercourse with D.*

In our view, in a situation where there was no consensual kissing (or other sexual activity), this kind of direction could be usefully modified to direct the jury that just because the complainant let the defendant into her house, bedroom or bed, it does not mean she must have wanted to go on to have sexual intercourse and must have consented to it.

We also support the introduction of this direction in a general sense where some consensual activity has occurred at the time of, or immediately prior to, the alleged offending (as consistent with the scope of the reform of section 44(1)). The direction in its entirety would have been, in our view, both appropriate and useful in the *Carter* case discussed above.

### **Myths about intoxication through drugs or alcohol**

As noted above in Chapter Seven, intoxication and consent were closely linked in our sample of cases. However, the impact of intoxication may also be relevant from the point of view of misconceptions about rape. The Law Commission considered the research showing that jurors may be affected by an erroneous belief that if a complainant has been drinking alcohol or consuming drugs, they are partially responsible for the offending, or provoked it in some way.<sup>82</sup> The recent New Zealand *Gender Attitudes Survey* found that 15% of respondents agreed with the statement that “[i]f someone is raped when they’re drunk, they’re at least partly responsible for what happens”.<sup>83</sup>

In the *Vandenberg* trial, the prosecution said this in closing:

*Members of the jury Zara Wilkes got herself in a stupid situation. No-one would say that she acted as sensibly as she should have. She was likely drunk and she definitely left a bar with a strange man 45 minutes after meeting him. But having got herself in that stupid situation she is still entitled to be protected by the law. She does not sign a stupid situations waiver which means that she deserves what comes her way. She is allowed to go where she wants to be with who she wants and she’s entitled to say no to sex whether or not she has got herself to the car and whether or not sex has previously occurred.*

82 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at [12.67] and the sources cited.

83 National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) at 23.

We did not find any overt instances of defence counsel stating in closing submissions that a complainant who was intoxicated or had consumed drugs was responsible for the offending, or provoked it in any way.<sup>84</sup> However, the flavour of this sentiment was certainly present at times. In the *Yamada* case, defence counsel said:

*So, I suggest to you that it's likely that what he said is that that was actually true when you consider the circumstances, the emotional connection of the prior play and the fact that she was drinking, you know, and he was drinking. Inhibitions get lowered, do all these silly things. If we didn't have alcohol I'd be without a job, you know, it's just, it's these things happen. So, what he says about that hasn't really been refuted reliably by anybody.*

While some of this statement is clearly directed at a submission the complainant was intoxicated, and consented because her inhibitions were lowered, the statement in bold goes beyond a comment on the evidence. Instead, it seems to imply that when alcohol is involved, it is common for consensual sexual intercourse to occur that is then later regretted. In other words, if the complainant had not been drinking in this case, she would not have had sex that she later regretted. Implicit in this comment is an assumption that if the complainant had not been drinking, the incident would not have occurred, a statement that is close to blaming the victim because of her intoxication.

In summing up to the jury in *Satae*, a Pilot case, the judge addressed the defence submission that alcohol might make people do things they would not otherwise do if they were sober:

*What he does do is he contests the suggestion that the defendant was overly pursuing her. There is no doubt of course there had been drinking and the defence said to you that the significance of "drink" here is, first, that people do become disinhibited and they do things that they might not otherwise do were they sober. Secondly, it affects recollections and, finally, it will affect perceptions.*

*In this of course the defence is absolutely right, and when you are looking at the evidence and when you are looking at matters such as "how long things took, timings and the like", you will no doubt bear those factors in mind.*

In another Pilot case, *Waititi*, the judge said the following about intoxication:

*All the witnesses were drinking. Some consumed cannabis. You will need to take some care about that. Obviously, if people consume enough alcohol or cannabis, that can affect their perception of what is going on around them. It can affect their ability to remember and, therefore, relate or describe or later relate or describe those events. Ensure that you factor all of that into your assessment of all of the*

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84 But see the discussion in Chapter Eight at 352.



*witnesses who were at the party. You decide whether any witnesses were affected by alcohol or cannabis. You decide what effect, if any, that has on their honesty or reliability.*

In *Yamada* the prosecution case was that the complainant, Grace, became so intoxicated at a work function at a workmate's house that she was put to bed there. Grace could not recall much of the evening, but alleged that she woke up to the defendant, Rangi, another of her workmates, having sex with her. The defence case was consensual sex, bolstered by evidence of an expert about the way people might behave while having an alcoholic blackout.

In summing up, the judge of course dealt with intoxication. In discussing consent, the judge said:

*You will have to ask yourselves, "Did the complainant know what she was doing?" "How much alcohol had she consumed?" "Was she too drunk?" "Was she asleep?" "Was she acting, in terms of alcoholic blackout, in relation to Dr T's evidence?" "Was the accused a man who was taking advantage of a woman, who was in a vulnerable position?" "Did he really believe that she was consenting?" "Should she have been safe from such attention in his bedroom?"*

Later, the judge directed the jury to assess the level of the complainant's intoxication, but very clearly (and appropriately) left that assessment to the jury:

*Insofar as consumption of alcohol is concerned of course, all seem to have consumed quite a lot. There are varying assessments. We know the complainant was drinking a higher-octane alcohol than the others and also, after she became upset, at a faster rate. So that is something you will have to assess in the light of the evidence of consumption and her behaviour before she ended up in the bedroom. Important of course, in your assessment, of her state whilst she was in that bedroom, was she intoxicated? Was she asleep? Was she in an alcoholic amnesia?*

However, what was missing from this summing-up was any direction to the jury to ensure that they did not erroneously ascribe any responsibility for the offending to the complainant. In our view, a direction along these lines from the judge would have alerted the jury to the need to take care when undertaking their assessment of the evidence, and to ensure that they were doing so neutrally. The use of such a direction would be consistent with the recommendation of the Law Commission that a sample direction be developed to address the myth that a complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.<sup>85</sup>

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85 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at 204, Recommendation 22. See further the discussion at [471](#).



In England and Wales there are a variety of directions that are aimed at countering misconceptions about complainants in sexual offences, or sexual offending more generally. These are not legislated for, but rather are found in the *Crown Court Compendium*, produced by the Judicial College, updated bi-annually and available online.<sup>86</sup> Chapter 20 of the *Compendium* deals with sexual offences, and in particular the danger of assumptions. The *Compendium* notes that there is a possibility that juries will make, and/or be invited by counsel to make, unwarranted or preconceived assumptions. The judge must alert the jury to guard against this, and must do so in a fair and balanced way, putting it in the context of the evidence and the arguments raised by both the prosecution and defence.<sup>87</sup> A number of sample directions are set out, including one entitled “[i]ntoxication (drink and/or drugs) on the part of the complainant whilst in the company of others”. It reads:<sup>88</sup>

*W has accepted that he/she was very drunk on the night of [insert]. But it is important you do not assume that because W was drunk he/she was either looking for, or willing to have, sex. When it was suggested to W in cross-examination that he/she was out that night to get drunk and then to have sex, W said [insert]. You must not assume that because W was drunk he/she must have wanted sex. People do go out at night and get drunk, sometimes for no reason at all. It would be wrong to leap to the conclusion that just because a person is drunk they must be out looking for, or willing to have, sex. It would also be wrong to leap to the conclusion that someone else who sees and interacts with that person could reasonably believe that person would consent to sex.*

The Law Commission has cited this direction with approval and recommended a similar direction be adopted in New Zealand, to counter the illegitimate belief that a complainant who has consumed alcohol or drugs is partially responsible for the offending.<sup>89</sup>

We support the adoption of a direction about intoxication, and note that an illustration can already be found in one of our cases. In summing up in the *Jackson* case the judge said:

*We are not here in a Court of morals. You may well take the view that the complainant was very foolish to have put herself in the position that she was in, to have ended so drunk and “wasted” to use the common vernacular on drugs, that she was sick and falling asleep in the garden, taken and put into a bedroom on a bed with a stranger and left to sober up when she was in such a state of*

86 Judicial College *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf>

87 At 20.3.

88 At 20.8.

89 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at 204, Recommendation 22.

*disarray. But you might be critical of her in that, but that is not to say that you are justified in concluding that she had something like this coming or that she was asking for trouble and was not to be heard to complain about it. That would be wrong thinking, members of the jury.*

### **Myths about “real rape”**

There were also a number of ways that counsel sought to rely on the stereotypical idea that “real rape” is violent, or involves threats, occurs between strangers, not people who are known to each other and occurs in public places, not homes or bedrooms.<sup>90</sup> In the principal research case of *Patel* the complainant, Lily, became separated from her friends while socialising at an entertainment precinct. She encountered the defendant, Dinesh, while trying to find her friends and he offered to help her find them. Lily alleged that while Dinesh was taking her through some side streets, he isolated and raped her. Despite the similarities with the “real rape” stereotype (the parties only met that evening, there was no intimate relationship between them and the alleged rape occurred in the street) defence counsel still tried to draw a distinction between the stereotype and the circumstances surrounding the alleged offending:

*It’s not a case where this person has been abducted, bundled into a car, raped in the back seat of the car, or ran out of the car and raped in a park. No, nowhere near like that situation, but what happened afterwards is important.*

The judge did not directly deal with this submission in summing up to the jury. However, the judge did warn the jury not to use their role as jurors to advance their own feelings about the way sexual offending is dealt with in our society:

*As I said at the start of the trial, with all of the publicity about this Roast Busters issue recently, even though this is a very different situation from young men getting underage girls drunk and filming their sexual encounters, there is a danger you might be inclined to use your role in this case as a vehicle to advance your views on sexual offending in the way that it is dealt with in our society. Please don’t do that. Your task is to decide this particular case, to do it solely on the evidence you have heard and to ignore any extraneous influences.*

The judge went on to warn the jury about putting aside feelings of sympathy and prejudice. While commenting on the need to focus on the case in front of them, the judge did not directly confront the “real rape” stereotype raised by the defence.

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90 See Susan Estrich “Rape” (1986) 95 Yale Law Journal 1087 at 1088 and 1092 for one of the first discussions about what amounts to “real rape”.

A similar approach to the “real rape” stereotype can be seen in the principal research case of *Simon*. The complainant Parvin was celebrating and became heavily intoxicated. She met the defendant, Haris, and alleged he took her to a public toilet and raped her. Again, while the parties were previously unknown to each other and the alleged rape occurred in a public place, defence counsel still sought to distinguish this from a “real rape” scenario by relying on the fact that Parvin told Haris her name:

*Now Ms Azarmandi told Mr Simon her name. She told him her name was Parvin. Would you tell someone, if you were being raped, what your name was, that your name was Parvin? How else could Mr Simon have known her name if she hadn't told him, because when he's been interviewed by the police he says, well, she told me her name and I told her my name was Haris, and that's because that's exactly what happened. Is this consistent with a rape taking place in the toilets, that they're exchanging names?*

In *Gamage*, one of the principal research cases, the judge was very clear about disrupting the “real rape” stereotype before turning to analysing the legal elements of the counts faced by the defendant:

*It's important at the outset though that you understand that sexual violation by unlawful sexual connection, which are counts 3 and 4 and sexual violation by rape, count 5 do not of themselves mean that it's sexual conduct or sexual connection accompanied by violence. That's not what our law is about. When we talk about rape we often think about, you know, people being dragged off into the bushes, and force and pressure and screaming and yelling. Well, I can tell you that that's not the law. The law is that rape or sexual violation is sexual conduct without consent and without a belief in consent based on reasonable grounds. And it's important that you understand that from the outset.*

This kind of statement from the judge provides the jury with an alternative narrative to disrupt any previously held beliefs about the nature of rape. It is similar to a direction found in the *Crown Court Compendium* which warns juries to dismiss any assumptions they hold about rape, the type of person who is usually a victim or a rapist or the way in which a victim would usually behave (see below).<sup>91</sup> In our view, a direction of this type should be included in the list of directions available to judges for use in appropriate cases.

### **Sexual violence is committed by strangers and/or sexual violence by a partner or acquaintance is less serious**

In its recent second review of the Evidence Act 2006 the Law Commission also recommended the development of a judicial direction that would address the myth that “real rape” is

91 At 448.

committed by strangers and/or sexual violence by a partner or acquaintance is less serious.<sup>92</sup> This characterisation of rape was not particularly prevalent in our sample. However, it was alluded to in at least one case, where the defence counsel in closing the *Lino* case (a Pilot case), seemed to suggest that because the complainant and defendant were known to each other, different considerations might apply.

*You have got to deal with these people and this is what I'm now going to do. This is not two strangers who had never known one another in any shape or form, that's the first one.*

...

*But if you go on the timeline, so this is not a situation letting up to this night of stranger on a stranger, where different considerations might come into it.*

This tactic seemed to be part of a wider strategy by defence counsel to reframe the complainant's narrative from rape to sex. Defence counsel pointed to a number of factors they said the jury should take into account, including the personalities and size of the complainant and the defendant, and that both parties were the same age, this was not a situation of an older man with a young person which might engender different considerations:

*You might like to take into account also the personalities of these two young people let alone the size, we had direct evidence, he's slight you can see that, but we had it from her. He's slightly built, she's physically bigger than him and so is her friend. You might like to take into account and it's a matter of assessment for you, you had three hours or whatever it is to see him. That he seemed to be quite – these are my words I'm not being rude to him, "A soft boy." You might like to take into account that she seemed to have some, certainly under cross-examination, steel to her. Those are all matters for you, that sensible people I suggest would take into account. But if you go on the timeline, so this is not a situation letting up to this night of stranger on a stranger, where different considerations might come into it. This is not a situation where it's an older man on a person who's 17. You might think differently if that was the situation. This is a situation of two 17s – he's just 17, so is she. (*Lino*)*

In this case, the complainant, Terri, was social media friends with the defendant Mason. Terri became intoxicated during a night out, and with her close friend, went to Mason's house. She and her friend went to sleep in the lounge, and Terri alleged she awoke to Mason raping her. Terri explained that she froze when she realised what was happening to her. It is not altogether clear what different considerations defence counsel thinks would be appropriate

<sup>92</sup> New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at 204, Recommendation 22.

to assess if this was a case where the parties were strangers. Of course, it is a part of the evidence that the parties knew each other, and might have relevance. However, when the relationship is juxtaposed with a situation where the parties are strangers, the tactic seems to be based on a stereotypical idea about rape, rather than the evidence in this case. The point of making such a comment could only be to put in the jury's mind that because the parties were known to each other, it was more likely that what occurred was sex, rather than rape.

Another case in which the idea that sexual violence is not committed by a partner, or is less serious than stranger rape was alluded to in the principal research case of *Carter*. In this case, the complainant, Theresa, met the defendant, Zachery, through an internet dating website and they went on a couple of dates. During a date, Theresa said that Zachery suggested sexual intercourse. She declined to have intercourse, but did agree to some other sexual activity. Theresa alleged that, despite her protests, Zachery forcibly penetrated her. In closing the prosecution case, the prosecutor was clearly alive to the potential for the defence to allude to some form of argument that rape does not occur between partners and fairly forcefully tried to rebut this myth or understanding:

*Now likewise you've heard of a rape in the context of a relationship. What you might have heard of is called date rape. Now without personal experience of rape yourself no doubt your knowledge of rape is probably confined to what you hear in the media and what you see on TV and it might be that the rape scenario that you're familiar with being portrayed is a stranger who grabs a woman off the street and violently rapes her.*

*Just because the circumstances of this rape are different and just because it happened between two people who know each other and just because it happened after they'd had some consensual touching does not mean that you should consider this an – that this act was any less violating and any less deserving of your attention.*

*Rape is non-consensual penetration of a person's genitalia and it can happen in marriage. It can happen in any relationship, whether it be a heterosexual relationship or a homosexual relationship. It can happen at any time. It can happen even after consensual acts. Because the law provides that any one of us can say, "no," and be protected from unwanted sexual violation.*

*So, I ask you to put aside any preconceived notions that you might have had about rape before this trial started and just focus on the legal elements that you are required to consider and assess those legal elements against the facts of this case.*

This forceful attempt by the prosecutor to pre-empt any reliance on such an idea was necessary as defence counsel made a number of statements that seemed to rely on the idea that rape did not occur in this situation as the parties were already sexual partners:

*If that conduct was not indicating a change of mind [to consent to sexual intercourse], what more was needed? A written invitation to have intercourse? Ladies and gentlemen, it just doesn't happen like that. You know how it happens; one thing leads to another, and that is exactly what was occurring here ...*

*The major inconsistencies with rape were her actions and reactions, both before and after the sexual intercourse occurred. Really, it's, when you look at the whole scenario, the invitation into the room, why she behaved in the way she did, and you consider whether you've ever heard of a rape victim finishing off the rapist in the way that she did, inviting him to ejaculate on her tummy, it's almost unheard of, isn't it? And after it, going [training] for an hour. Then texting the rapist in a friendly way. I suggest it has none of the hallmarks of rape. It may have the hallmarks of consensual sex later regretted and she has put all the spin she possibly could to dress it up as rape ...*

*What rape is preceded by consensual kissing, cuddling, sexual foreplay and finished with a hand job? He had every reason to believe that she was up for it, as I say. These two relatively young people perhaps misinterpreted what the signals really meant, but that doesn't add up to rape, not in circumstances like this. The incident had none of the hallmarks of rape, no bruising, no pain, no injury, no threats, no threats not to tell anybody. None of those sorts of hallmarks.*

The surrounding circumstances and other consensual sexual activity were clearly relevant considerations in this case. However, we consider the defence statements in this case went further than setting out the factual scenario, but, rather, encouraged the jury to assess the evidence against a contestable view of what rape really looks like. In summing up, the judge emphasised that the key time for assessing consent was when penetration occurred and stated:

*Ms Bush's words, behaviour, and attitude before, during and, indeed, after the acts itself may be relevant to that issue but it is not necessarily decisive. The real point is whether there was true consent or reasonably-based belief in consent at the time penetration took place.*

However, the judge did not go on to deal more generally with the issue of stranger rape that both counsel discussed in closing. When discussing the respective cases of the Crown and defence, the judge did summarise some of these issues. In our view, it would have been appropriate for the judge to comment on the underlying assumptions relied on by the defence in this case, along the lines of the direction recommended by the Law Commission. The *Crown Court Compendium* contains a direction entitled "avoiding assumptions about rape", which states:<sup>93</sup>

93 Judicial College *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-July-2019-amended-1-August-2019.pdf> at 20.4–20.5.

**Example 1: Avoiding assumptions about rape**

It would be understandable if some of you came to this trial with assumptions about rape. You may have ideas about what kind of person is a victim of rape or what kind of person is a rapist. You may also have ideas about what a person will do or say when they are raped. But it is important that you dismiss these ideas when you decide this case.

From experience we know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people. And people who are raped react in a variety of different ways. So you must put aside any assumptions you have about rape. All of you on this jury must make your judgement based only on the evidence you hear from the witnesses and the law as I explain that to you.

We consider that a direction such as this would have been both appropriate, and helpful to the jury in this case, particularly given the defence's invitation to the jury to make unwarranted assumptions about the true nature of rape, and the prosecution's extensive attempt to rebut this reasoning.

**“Real rapists” do not behave as the defendant did**

One of the most enduring themes of the defence closing arguments was the reference to what a “real rapist” looks like or does. In 23 of the principal research cases and four of the Pilot cases defence counsel made some reference to some aspect of the defendant's behaviour that indicated the defendant was not a rapist, or that the sexual contact was consensual. In many cases this took the form of distinguishing the defendant from the stereotypical rapist who violently attacks a victim and callously leaves her behind, by demonstrating that the defendant had shown concern or care for the complainant:

*There is an agreement between the two of them here that at some stage he asked her if she's okay, and well, I simply ask the question, is that consistent with raping her or with being concerned for her? (Devi)*

...

*It's not just the acts themselves that you need to look at members of the jury because when we're talking about serious allegations of rape and sexual assault we need to look at all of the surrounding circumstances, not just the ones that I've already referred to leading up to all of this activity but also the ones on the other side of the activity as well. What happened immediately after the sex. Ms Taylor complained of a headache so Mr Gamage went and got her some Panadol and some water. Ms Taylor asked Mr Gamage to pass her her handbag with her phone in it and that's exactly what he did. Ms Taylor told Mr Gamage, “You'd*

*better unlock the doors because my cousin's coming round." So, he does so and we know that those doors were unlocked when Ms G arrived because she walked straight through the front door. He's acceding to all her requests, he's handing her her phone and he's taking care of her needs. All up until she leaves with Ms G and what's the thing we see from [her] at 4 o'clock or thereabouts, "Where are you habibi? Kiss, kiss, kiss." None of those are actions in my submission members of the jury which are consistent with the allegations that are levelled against him. (Gamage)*

In closing the *Jackson* case to the jury, defence counsel simply stated:

*Mr Jackson, members of the jury, is not the rapist that the Crown would have you believe. He is a considerate, caring, polite and respectful young man, as he's been referred to.*

This submission tends to ignore the fact that Mr Jackson could be both considerate, caring, polite and respectful, as well as his conduct meeting the statutory test for rape. We consider that this type of submission, combined with the use of the word "rapist" in this context may support some jurors to seek to distinguish "normal men" from "rapists". Louise Ellison and Vanessa Munro's mock jury studies have shown that jurors tended to have an expectation that a "typical rapist" would be marked out as distinct from "normal men", despite research to the contrary.<sup>94</sup>

This strategy, of distinguishing the defendant from a "rapist", or by explaining aspects of behaviour as not being what a rapist would do, was used in nearly one third of all 30 cases from the principal research:

*There's no suggestion that he dragged her back to the bed and threw her onto the bed to have his evil way with her is it? ...*

*If he was a rapist is he going to write in and say yes I've just – I'm sorry effectively for raping you. I don't think so. (Buchner)*

...

*If he was of a mind that he had just raped Theresa Bush and there was a lack of consent and he used force to penetrate, why would he send a text of apology about the play-fighting? It would be the last thing a rapist would do, you may think –*

*Is an apology consistent with the behaviour of a rapist? (Carter)*

...

94 Louise Ellison and Vanessa E Munro "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 Social and Legal Studies 291 at 298–299.



*They're really bickering a bit like an old married couple but if you look at what Mr Ihaka is reported to say, "I didn't mean to hurt you". Is that the sort of response you would expect from a man who didn't care about whether his sexual activity was consensual? Does that sound like the sort of response from a man whose sexual activity is solely about his own gratification and he doesn't care whether there's consent or not? It doesn't. (Ihaka)*

...

*For that matter, why does a rapist bring breakfast in bed? (Masters)*

...

*So we've all heard, and I think it's accepted, that there was around 20 minutes between this alleged incident and David Oakes, the brother, going down to the car to speak to them. So, this nasty rapist has hung around down the bottom of the driveway for 20 minutes, his means of escape are right there. But no, he's still sitting in the car talking to his friends. He asked David Oakes if he could come back into the party, he wanted to talk to Holly about why she was upset and he tried again at the gym a few days later. (Nash)*

...

*He didn't leave those toilets and act like a man who'd deliberately and knowingly committed a calculated rape, or as the Crown would say, deliberately take advantage of a woman that he knew was too intoxicated to consent. Did he act like that? If he'd known he'd done that he wouldn't have been back at work talking to people about it ...*

*So, if you were a man who had raped a woman why would you go back to the kitchen and tell your workmate? (Simon)*

...

*The attempted anal business, I said that was simply an accident doing the doggy-style thing and she said, "No," and I said to her if he was a rapist he wouldn't have stopped, and I say that to you. If he was, in fact, a rapist, and if he wanted to anally violate her, he would've carried on, but he didn't. (Walters)*

...

*So this nasty man had done this and wants more and hasn't had the full sex as he's anticipating, which she in fact agrees that he was wanting to have with her; he's not shying away from that but if he wanted, if he was this rough person he'd be grabbing her again and trapping her onto the bed and holding her down and having sex with her. (Wilde)*

These examples all demonstrate defence counsel seeking to draw a distinction between aspects of the defendant's behaviour, and the anticipated behaviour of a "real rapist". Many of these examples focus on the ongoing interactions between the complainant and the defendant. The implicit assumption underlying this type of submission is that rape involves a complete break between the assailant and victim, so that ongoing contact, particularly contact that indicates concern or consideration for the complainant is not consistent with rape.

Another theme that emerges from these examples is that because the defendant did not use violence or force, or desisted in certain (more reprehensible behaviour) he could not be a rapist, and this was not rape. In the most overt example of this strategy about comparing the defendant's actions with those of a "rapist", defence counsel in *Yamada* pointed to the fact that the defendant did not ejaculate:

*Mr Yamada didn't rape a comatose woman.*

*Two things are important about that also. First of all, there was no evidence at all that he made any threat against her, if he said, "Don't tell or else," or anything like that. And secondly, and this is significant, there's no evidence that he ejaculated. You know, if you were going to rape a woman who was comatose for your own sexual gratification, you're in that – if a man's in that mode where he just wants to have sex, come what may, whether the woman's awake, asleep or whatever, he doesn't care. Is he going to stop before he ejaculates? No. There's no evidence at all from anyone that he ejaculated. So, if you look at it, is it possible that what he's saying is true.*

...

*He didn't reach full climax himself but he enjoyed what was there and what did happen. It is really significant that he didn't ejaculate in a case like this, I say. If he was really raping a comatose woman you would expect him to keep going. He didn't.*

This submission was made despite the fact that ejaculation is not an element of rape as defined in section 128 of the Crimes Act 1961. Instead, there seems to be an underlying reliance on traditional mythology about gender roles in sexual communication, and the idea that men (or rapists) have a sex drive that takes over all rational thought.<sup>95</sup> This idea, that men's sexuality overpowers their ability to control themselves, was not particularly prevalent in the closing submissions, probably because it would tend to support a narrative where consent was ignored, or there was no reasonable belief in consent. However, as can be seen here, it was used in order to try to differentiate defendants from "rapists".

95 See also the reliance on this idea in Louise Ellison and Vanessa E Munro "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 Social and Legal Studies 291 at 297–299.

Another subset of the reliance on defendants' actions as being unlike that of a rapist involved situations where there had been an apology after the alleged sexual offending. In closing to the jury in the *Elliot* case, defence counsel stated:

*So, he sends a text, an apology text. Again, the Crown would have you believe that he was trying to endeavour to ensure that she didn't go to the police. But equally, isn't it a text from someone who actually genuinely cares for that woman and who thinks that he might have done something that she didn't like, like being rough because he, in his evidence, conceded that the way he rolled her over and pulled her pyjamas down may have been rough. So, might it not be that his apology and his request for forgiveness was no more than him trying to genuinely apologise for what he thought he had done.*

Similar comments were made in both *Buchner* and *Carter*, and in the Pilot case of *Sarkisian*. In *Buchner* the prosecution sought to make much of the Facebook message sent by the defendant, Anthony, to the complainant, Farida, the day after the alleged rape, in which Anthony said he was "Fuckin sorry for last night. Way, way out of line. Acted like a f-ing douche bag. There's nothing I can really do to correct what I did. It's fuckin disgusting and I'm 100% ashamed of myself". In closing, defence counsel submitted that this apology was not something a rapist would do, but in fact was consistent with Anthony's narrative that he had:

*[G]one a bit over the top and made a romantic move against the girlfriend and so he's sent an apology which is what an honest straight up guy would do isn't it? I suggest to you that supports his account of what's happened. If he was a rapist is he going to write in and say yes I've just – I'm sorry effectively for raping you.*

In one of the Pilot cases, *Waititi*, the submission was made that if Mr Waititi was intent on forcing himself on the complainant, there would not have been a conversation about a condom:<sup>96</sup>

*And, of course, the complete implausibility of this suggestion of rape is highlighted even further by her evidence around the condom. Because if you've just had a violent struggle with someone pushing them away, pushing them away, how plausible is it that Mr Waititi would have stopped, picked up a condom and had a chat about it? How plausible is any discussion about a condom, how could that possibly be linked to non-consensual sexual activity?*

*If you are intent to force yourself on somebody you might think that you wouldn't be too worried about contraception. You might think that if you were engaged in non-consensual sexual activity you wouldn't pause to have a chat about contraception. Rather, doesn't that suggest if it's true that Mr Waititi was making appropriate enquiries in the context of a sexual interaction he reasonably believed was consensual?*

96 See also Chapter Five at 139.

The other common use that defence counsel made of this submission was linked with time and place. There were a number of references to the idea that a real rapist would not have raped someone in a situation where there were other people around, or if they intended rape, they would have done so at the first possible occasion:

*[I]s Mr Edwards's attempts to tee up sexual activity with the complainant through JM consistent with him being prepared to rape and violate her, would Mr Edwards really risk raping and sexually violating someone when there's another person in the room, a witness just an arm's length away? ...*

*If he was in the state of mind to rape and violate Ms Matiu that night, why didn't he take advantage of the approximate two-hour period of time she was in the room on her own? ...*

*Or alternatively, why wouldn't he commit those acts whilst JM and his friends were down at the bottle store to get a four pack of bottles to finish off the night? JM wouldn't have even been in the house, let alone the room. (Edwards)*

In closing submissions for the defence in the Pilot case of Cropp, defence counsel really emphasised the difference between the defendant and a “rapist”:

*Now, members of the jury, the Crown is saying it's this man who has committed this horrendous act of violence. Now don't make any bones about it, this was an act of violence that had happened, because that's what rape is. But for him to have committed this horrendous act of violence as alleged, there would've had to have been a transformation in the proportions of Dr Jekyll and Mr Hyde, his whole personality would've had to have changed.*

*Now we know everyone was drunk, but the evidence is he had six beers during the course of the night, so we're not talking about someone who is completely and utterly inebriated and takes on a different persona. He was drunk, he was intoxicated, he'd just walked and then hitch-hiked from [suburb] to Paige's, so he was capable of basically completing that journey. He wasn't so drunk that he'd become someone else other than the way he normally would. You may think that he is a reasonably sexual person considering what we've heard in relation to the threesomes. But certainly, he wouldn't be the only man in New Zealand that we would describe like that.*

*Certainly, members of the jury, that is the type of transformation you need. Do you really think that in the early hours of [date] his intention was to break into Paige Downley's house, come what may, go in there and sexually assault her and rape her? A good friend of not only his wife, a good friend's cousin, a good friend of his. So that is a transformation of almost biblical proportions. That's what the Crown is saying ...*

*In bed, and this is not disputed, this is from both sides, from Paige Downley's side and from Mr Cropp, in bed he asks whether he can come inside her. Clearly the sex is nearly over, I put it that way. He asks whether he can come inside her. Now there are many things that you may think that a rapist would do, but do you really think that if a man so thoroughly disrespects a woman to do this right at the end, he becomes a gentleman. He becomes someone who is considerate of her feelings. That's something for you to take into account when you're thinking about his mindset, what happened that night ...*

*Now again, members of the jury, when you're looking about the way Mr Cropp acted on this particular night in the early hours, into the next morning, what does he do after this horrendous event, and it would be a horrendous event if what the Crown is saying is true. That is a given. What does he do? Does he finish off and then leave, hide, go somewhere else? No, he doesn't. He falls asleep, he goes to sleep and stays the night. He stays the night. Is that what you'd expect a rapist to do? Is that something that you would expect someone who thought they've just raped a good friend to do?*

*The next day he's woken at about 6.00 am because the alarm went off, I understand, and he's asked to leave because Ms Downley, understandably, didn't want her daughter to see him. He jumps out of bed straight away and leaves. And leaves.*

These examples are further situations where the sample direction from the *Crown Court Compendium* about avoiding assumptions about rape would be useful. When targeted to the circumstances of the case, and combined with clear directions about deciding the case on the evidence available, such a direction may mitigate the jury's reliance on stereotypical ideas of what a rapist looks like.

### **Victims of "real rape" would end all contact with the defendant after the alleged rape**

In a number of cases defence counsel sought to make much of the fact that the complainant saw, or was in contact with, the defendant after the alleged rape. The purpose of these comments seemed generally to convince the jury that rather than rape, what had occurred was "just sex". In some cases, defence counsel was overt about this demonstrating that this meant it was not rape, but rather sex:<sup>97</sup>

*The Crown attaches enormous weight to his text and say to the contrary to the accused's assertion she said, "Okay," she didn't text that at all, she didn't reply, but the Crown says that this text corroborates her account of the force used. It doesn't. He admits some force was used, some wrestling, some play-fighting,*

97 See also Chapter Six at 212.

*and I suggest the fact that she didn't respond is neither here nor there. The – he sent a text a bit later that day saying, "Are you okay?" because he hadn't had a response, I suggest, and if you go to the text messages, not long after he sent that text she sent back a text, extraordinary text in the circumstances – I'll just get the text – but it was the one that says – he texts, "Are you okay?" She comes back with, "Fucked, did time trials." This is to somebody who she claimed she had been raped by. So, it was an indication that she was tired, sure, she'd done the time trials, and it was a response to the question, "Are you okay?"*

*Then what occurred was even more perplexing, you may think. Would a rape victim then send texts of cute pictures of a dog? Engage in that sort of friendly texting with somebody who you believe had raped you? It makes no sense. In fact, it puts the lie to her claimed attitude that day. I suggest the anger started later than those texts otherwise she wouldn't have sent them. She simply wouldn't have responded.*

*And ask yourselves whether you found her explanation for sending of those friendly texts at all convincing? She said that if she sent texts back in any other format, unfriendly texts if you like, that he would visit her. He didn't even know where to go. She said, "Oh yes he did, yes, Main Road behind a black fence." Come on, ladies and gentlemen, he had no idea and there was no suggestion that he was wanting to visit her at all. Again, you may think that this was a convenient and unconvincing explanation for what is quite, quite inconsistent conduct; the nature and manner of those texts ...*

*Then texting the rapist in a friendly way. I suggest it has none of the hallmarks of rape. It may have the hallmarks of consensual sex later regretted and she has put all the spin she possibly could to dress it up as rape. (Carter)*

...

*The important factor is she's gone to his house and even if where we're talking two days before the end, that would still be an important factor because I don't know what you think, but in my submission to you, the last place you would go if you had been raped is to the very place where you're likely to be raped again. The most likely place where something's going to happen to you would be at that house alone with the person who's raped you. If you're scared of him and terrified and all the rest that she talks about, I suggest that's simply not true. You wouldn't have gone there. (Devi)*

...

*Contrast the level of upsetness she expressed to those people with her going to the gym two days after the party. She says, “I’m a strong woman, I’m gonna keep on going with my life despite what’s happened.” But remember what she told Troy a few days later about the text message, that she was so scared that they were going to come back and try and do it to her again. If that was really the case, would you go to the gym where your assailant worked, where you had a pretty good idea that he’d probably be? Would you go and do weights right next to where he and his mates are working out? I suggest not. She was milking the situation for all it was worth. Let’s look at what she told people on the night, and, yes, she said she was in shock. (Nash)*

In the *Walters* case, defence counsel castigated the complainant in closing for not immediately blocking her alleged rapist from Facebook, despite her explanation that she thought he might get angry if she did so:

*She said to me that she blocked him on Facebook. So, at 2.04 am, which is not long after the events, allegedly, I said, “Well, that was fun, see you next time. Did you sleep well; hope you didn’t get into too much trouble”. She remembered that. That’s not a joke. That’s a statement of best wishes, really, and then she says, “Yeah that was a good night, smiley face, no, Mum doesn’t care, she’s more pissed about me not going to the course. Soon as I got home, I just crashed hahaha, so tired”. This is sex talk between people, after having sex; not talk by a rapist to a victim and vice versa. She said to me, “Yeah, okay, that’s all correct, but I thought he might get angry.” So what? So, what if he got angry? It’s on the Internet, who gives a (inaudible) whether he’s angry or not, she could’ve blocked him immediately if she was so annoyed with him, but if he was to get angry who cares, he’s on the Internet, and who cares about that?*

In the same case, defence counsel specifically commented that because the complainant said goodbye to her alleged rapist when she left, she must have had sex, and later regretted it, rather than being raped:

*In fact, she said in her evidence that she was annoyed with her mother and she said that to Heath. She said that to her rapist, “I’m annoyed with my mother”. I don’t think so. She talked to him as one would talk to a lover, not a rapist. And the other thing she said when she left was, “My taxi’s here, I’m going, bye.” That’s to her rapist? I don’t think so. That’s to someone that she’s just had sex with.*

In this case, the complainant gave evidence that the defendant had physically attacked her at a youth group sleepover about one and a half years before the alleged rape. The judge directed the jury about the use they could make of this evidence, pointing out that it was not relevant to proving the current charges, but that if the jury accepted it happened as she said it did, it provided a contextual basis for other evidence. In particular, the judge noted that it was relevant to her explanation “that her Facebook responses to him later



maintaining a friendly front were all based on this underlying fear of him”. In some cases (such as this one), evidence about the complainant’s contact with the defendant after the alleged rape will be relevant to the narrative or to the complainant’s credibility. In such cases it is appropriate that the jury hears of it.<sup>98</sup> However, where such evidence is brought, we consider it should be accompanied by a direction to the jury about the use they can make of it and with a warning people who are raped will respond in various different ways. Contact with the alleged rapist after the rape, on its own, should not be seen as an indicator of consent.

### ***Myths about force or violence and physical injuries***

Related to the idea that complainants would always break off contact with the defendant if they had really been raped, was the emphasis in some closing statements about the lack of violence or threat as being indicative of the fact that what had occurred was sex, rather than rape.

#### **Lack of violence**

In *Ahmed* the prosecutor reiterated the view that violence is not required for rape to occur:<sup>99</sup>

*I want to talk to you members of the jury about this aspect of violence. There is no suggestion here and I think the complainant accepted it herself, that Mr Ahmed was violent towards her. She did however say under cross-examination you might recall that she was being held down by her shoulders but rape, sexual offending does not have to involve violence. All that needs to happen is that there is this kind of sexual connection or there is penile penetration of the genitalia without consent. That’s what these charges are all about. So if you have in your minds this idea that well, you know, if someone’s going to sexually offend against you they’re going to beat you up. They’re going to do something in addition to sexually offending against you, then disabuse yourselves of that idea because that’s not required. That’s not what happened here. It does not mean that this wasn’t genuine sexual offending. All that needs to happen is the type of contact that we’re dealing with here without consent and the complainant says, “I didn’t consent.” Well those are my words. She didn’t quite put it that way but her evidence, the effect of her evidence was that this was not a consensual sex situation. Being held down might be something that’s relevant to you if you accept from the complainant that that’s what’s happened.*

This lack of violence was also picked up by the defence counsel in *Ahmed*, although for quite a different purpose:

<sup>98</sup> See also Chapter Six at [212](#).

<sup>99</sup> See also Chapter Seven at [283](#).



*You'll remember in her evidence she talks about just putting her arms in the air and having her clothes off and taking her, and her having her clothes taken off, sorry. And I suggest to you again using your, your common sense, your worldly experience, does that really make sense or is it as Mr Ahmed says she in fact took her own clothes off. That's why they're not ripped. But equally and as she says, there were no, no violence. Page [ ] of the notes, "There was no violence". And when you're looking at, and what does this man believe or was he believing on reasonable grounds, well, there's no violence.*

*I asked her, "Well, were there any threats?" There were no threats. See, what Mr Ahmed was doing was having consensual sex with the complainant.*

In summing up the judge picked up on the prosecutor's characterisation of rape being sexual connection without consent and said:

*What I want to say to you is that consent means true consent, freely given by a person who is in a position to make a rational decision. Remember what has been said to you at the start of this case and I think it was by [Crown counsel] that what makes these acts unlawful is the lack of consent. In other words, you will see from the counts that we have before us that they are common enough sexual acts and they are not unlawful unless one or other of the parties does not consent to them. That is easy to understand. In other words, it is saying well yes, we might have sex but if one says no we are not going to and the other keeps going well that is not consent. That makes that an offence. It makes it unlawful and so consent means true consent freely given by a person who is in a position to make a rational decision. You should appreciate that lack of protest or lack of physical resistance does not of itself amount to consent.*

The judge then considered the effect of intoxication on consent. However, what the judge did not do, but in our view, should have, was specifically direct the jury that rape does not require violence or threats. While the focus was appropriately on the lack of consent, given the statements by defence counsel in this case, we consider it would have been appropriate for the judge to comment more specifically on the fact that real rape does not require violence or threats in line with the Law Commission's recommendation.<sup>100</sup>

In around one third of the principal research cases, defence counsel made reference to the fact that there had been no violence or threats by the defendant, despite the fact that physical force or threat of violence is not a required element of rape. In some cases, these comments were coupled with remarks about how the complainant's clothes had been removed, or intercourse achieved, with the implication that because there had been no violence, there must have been consent. For example:

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<sup>100</sup> See below at [471](#).

*In other words, she's pushed down to the ground. He's on top of her. She described that he's supporting himself somehow above her with a 200 [mm] gap between them. Well, if it was like that – I don't know if it was or it wasn't, but if that's what we're talking about, how he's there, how does he get her pants down? How do you do that? He's supporting himself on top of her. We definitely – there's no suggestion here that he's used violence or anything like that, you know, and he dragged them off or anything.*

A similar comment was made in the *Vandenberg* defence closing:

*She acknowledges there was no physical struggle. The medical evidence supports that. Her underwear has come off completely. It's not damaged. Again he's, it's been able to come off in a very confined space.*

The idea that some form of violence is required for the sexual contact to be rape was rebuffed by the judge in summing up in *Vandenberg*:

*That expert opinion, unchallenged, was to the effect that the absence of damage means nothing and, of course, here we know that sexual intercourse in fact took place and you may well think that there was no evidence of it being violent, because rape is not violent sex, rape is sex without consent and without a reasonably based belief in consent. So, there is no inference to be drawn if you accept that evidence, and of course it's a matter for you to say, "Well there's no damage therefore she must have been consenting," that wouldn't be a proper approach I suggest to you.*

The jury was clearly directed that they could not use the fact that there has been no damage to the complainant as evidence of her consent. While the judge had not addressed the point in the defence closing that her underwear was able to come off completely without damage and in a confined space (which the defence seems to be using as a lack of resistance, and therefore an indicator of consent), there was at least a clear rebuttal of impermissible reasoning from the lack of damage or injury to the complainant.

In *Patel*, however, there was no particular response by the judge to the submissions made by defence counsel as to why it was not rape, as she could have just closed her legs:<sup>101</sup>

***Now it would have been so easy to avoid any sexual penetration in that situation, even if she were scared, but remember there were no threats, because all she had to do was merely close her legs. If she's up against the wall and had her back to***

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<sup>101</sup> There is no particular response to this submission in the summing-up in this case, but notably this kind of comment by a Canadian judge (sitting as trier of fact) led to a complaint to the Canadian Judicial Council and the judge's eventual resignation: Janine Benedet "Judicial Misconduct in the Sexual Assault Trial" (2019) 52 University of British Columbia Law Review 1 at 4.

*Mr Patel, if she'd closed her legs then the penetration simply wouldn't be possible, it's as simple as that. Or she could have just, or she could have just sat down, or she could have walked away very easy. There was no suggestion that there were any threats. No suggestion of any violence. At that stage she could have attempted to walk away, she could have closed her legs, she could have sat down.*

However, the following extract from the *Patel* closing is a good example of the prosecutor seeking, in advance of the defence closing, to dismantle any argument based on an outdated idea of how a victim should behave:

*There is no basis the Crown says, for the accused to believe that she was consenting. He tried it on with her twice during that walk to the alleyway. First, he tried to kiss her and she asked him what he was doing, and told him that it wasn't okay. No[w] you might think, "My God why didn't she run then?" Why didn't she? Well as she said, he was her help and seemed okay with her telling him, "No". But then he pushed her up against a wall further on and tried to put his hands down her underwear. The Crown says he became more forceful and at that stage she pushed him back with force and told him, "No". She made it dam[n] clear. She says that he seemed not so friendly anymore at that stage. And straight away he grabbed her hand and he led her across the road. Not 100 metres, not 200 metres, not up near [retailer]. Across the road to an alleyway where he forced her over, removed her underwear and raped her. No, she didn't fight back. She didn't scream her head off. She didn't go running into the street screaming, "Rape". But members of the jury this isn't an American TV show that we watch on nights when we're at home, this is everyday life. Lily Kowhai reacted the way she knew how. She was shocked, she was scared, and she didn't want to make the situation worse.*

The idea that the complainant had not suffered from any injuries, or that there was no evidence supporting any injuries that would have occurred if the jury believed the complainant's account, was referred to in five cases from the principal research (but not in any of the Pilot cases). This can be seen very clearly in a passage from the *Jacobs* defence closing:

*You might think if her entire story was true you might have seen a lot more bruising, while the Crown sort of tiptoe around that and say oh well you know it's such a difficult thing bruising it doesn't always come up and it's not quite what you think it is, and well you can't have it both ways.*

Again, this statement from defence counsel indicates the difficulty in isolating and addressing the reliance on rape myth in trials, and the way in which the ideas might hold persuasive force in quite an oblique manner. In *Jacobs* the complainant, Sara, had been working for the defendant, Caleb Jacobs. She alleged that Caleb invited her to his house, then took her to a farm, detained and raped her. The defence was that there had been consensual sex during the evening and that Sara was attempting to hide that from her boyfriend. Caleb had two previous convictions for similar offending, evidence of which was admitted at the trial.

Given the defence theory of consensual sex, it was appropriate for them to challenge Sara's evidence. However, by focussing on the lack of injuries or bruising that have occurred, the focus has subtly moved away from a challenge to her credibility about her story as a whole, towards the "real rape" idea. The challenge to her credibility is based on an underlying appeal to the idea that rape is violent and results in bruising and injury.

There was medical evidence in this case, which was commented on by both the prosecution and defence in closing. However, the judge did not give a direction about the use of the medical evidence as expert evidence in summing up. While the judge repeated the defence theory that if the complainant's story was true, you might expect more bruising, the judge did not specifically address this comment beyond stating that it was a matter for the jury. While that is true, it is not particularly helpful. If the judge had directed the jury that this submission was relevant to an assessment of the complainant's credibility, but reminded them that rape does not necessarily involve violence or force, there would have been a balance between the defence need to test the evidence and an invitation to the jury to rely on rape myth.

Although the *Jacobs* case demonstrates an oblique reference to the lack of injury or bruising, in a sentence that misrepresents the statutory definition of rape, the defence counsel in *Carter* said: "The incident had none of the hallmarks of rape, no bruising, no pain, no injury, no threats, no threats not to tell anybody".

Given that sexual intercourse does not require any of the listed consequences to meet the definition of rape in section 128 (and section 128A), it is hard to see why comments such as this should be allowed to go to the jury unchallenged. Not only do they rely on outdated stereotypes about rape, but they also have the potential to misrepresent the legal test to the jury.

The judge in the *Carter* case did not respond to this comment in summing up, although he did direct the jury when defining consent that:

*A lack of protest or physical resistance does not of itself amount to consent, although those circumstances might be relevant to the issue of Mr Carter's belief in consent and I will get to that in a moment.*

***A person does not consent if, in the context of this case, she allows the activity because of force applied to her. But consent that is given reluctantly and later regretted is, nonetheless, true consent. Not wanting a sexual connection is not the same thing as not consenting to it.***

Clearly the judge was alive to the issue of force, which was, in fact at issue in the case. It was common ground that the complainant and defendant had taken part in some wrestling or “play-fighting”. The defence accepted this conduct may have gone too far. In fact, the defence case was that a text sent after the alleged rape in which the defendant said something like “Real sorry I was way too forceful feel awful now”,<sup>102</sup> was in relation to the play-fighting, rather than an apology for forced intercourse, which was the way the prosecution represented it. In this context, where there was a factual dispute about the level or type of force, it would have been appropriate for the judge to have been more direct in explaining that rape does not require force, pain, injury or threats. Otherwise, there was a risk that the jury might conclude that, regardless of the meaning of the text, there was no rape because there was no real force.

In the Pilot sample, the *Lino* defence closing specifically pointed out the lack of violence and threats present. However, the complainant, Terri, claimed she was intoxicated and asleep when the defendant sexually assaulted, then raped her. While it is true that there was no violence or threats, the complainant’s narrative did not suggest that any were present, and given the factual scenario, which was the defendant allegedly taking advantage of an intoxicated and sleeping complainant, it is not surprising that they were not alleged. This is another way in which ideas about “real rape” are brought before the jury in quite a subtle way.

However, these ideas were also challenged by judges in some cases. In *Damage*, the judge said this in summing up:

*It’s important at the outset though that you understand that sexual violation by unlawful sexual connection, which are counts 3 and 4 and sexual violation by rape, count 5 do not of themselves mean that it’s sexual conduct or sexual connection accompanied by violence. That’s not what our law is about. When we talk about rape we often think about, you know, people being dragged off into the bushes, and force and pressure and screaming and yelling. Well, I can tell you that that’s not the law. The law is that rape or sexual violation is sexual conduct without consent and without a belief in consent based on reasonable grounds. And it’s important that you understand that from the outset.*

A similar point was also made by the judge in *Buchner* (below), although not as strongly, and in the context of defining consent. As such, it had the potential to be lost, rather than being presented as a discrete “myth busting” direction as it was in *Damage*:

*Secondly, in relation to that charge the penetration must have occurred without the consent of the woman. Rape is not necessarily intercourse by force although you might think so. It is penetration without consent and the third one, without belief on reasonable grounds there is consent.*

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102 See also Chapter Seven at 307.

### Real victims would try to resist, escape or flee

Related to idea that rape involves threats or violence, there were a number of references in the defence closings to the idea that a real victim would immediately try to escape or flee a real rape scenario. There were 14 cases in the principal study where defence counsel sought to make something of the fact that the complainant had not left, or fled either after the alleged rape, or during it. In three of those cases, counsel referred to the fact that the complainant failed to use her cell phone to call or text someone to assist her to escape or flee. One of those three cases was *Walters* where defence counsel made much of the fact that the complainant was in contact with other people over the time of the alleged offending and did not ask them to call the police or for any other assistance in escaping from the situation.

The defence counsel in the *Vandenberg* closing took it further than most:

*She's, what, inches, millimetres away from a door handle. She, there's no attempt to get out of the car. There are people she can hear walking past. The obvious inference from that is if she calls out they'll hear her. There's obviously the opportunity to call out, ask for help, she doesn't do it, and again remember she's saying she's uncontrollable, she's crying uncontrollably and again if she's crying uncontrollably, I would suggest that some of these other reflex actions you would expect to kick in as well. She'd be struggling. She'd be calling out. She'd be pushing him away. She'd be trying to get out the door. She'd be trying to attract attention at the people walking past or whatever. Those are things, if you are in an uncontrollable state that I would submit would just happen and there's none of it.*

Similarly, in the *Yamada* defence closing, the following was said:

*And further, if what she was saying is true, if she'd woken fleetingly to – and that's assuming that she was ever asleep. When I say to you, as I said at the start there's no actual reliable evidence about that. If she'd woken to find – if she'd come-to, to find him on top of her raping her you might think she would've woken up in a real worry. Fought him off; pushed him off; got straight out of there. She didn't do that.*

These two closings are examples of defence counsel reframing the complainant's experience to blame her and to put the responsibility back on her to avoid or escape the situation she found herself in.

However, some of the references questioned the credibility of the complainant's account that the sexual contact was non-consensual. For example, in the *Ihaka* case where the complainant, Rebekah, alleged that the defendant, who was a friend of the family, had sexual intercourse and indecently touched her without her consent on a number of occasions when he was visiting her house. The defence case was that the intercourse was consensual (as was the sexual contact with the complainant's daughter, which was also the subject of charges in the trial). In the closing statement, defence counsel said:

*You might think once again as a matter of common sense if she had been forcefully sexually violated if she had been raped she would have been up off the couch, had her clothes up, run out of the room, run out of the house, done something but no she says when he asks where are the towels she tells him, she doesn't say get off or fuck off or something like that which you might expect and remember Ms Pantoja says that she speaks her mind so you haven't got any of that and this whole episode once again is one of those sexual encounters that occurs between people that have an ongoing sexual interaction, it's consensual and all the hallmarks that Ms Pantoja has talked about it support the fact that it was consensual.*

While it is legitimate for the defence to question the credibility of the complainant in order to advance their case that the sexual intercourse was consensual, doing so by reference to the fact that the complainant did not react in the way the defence thought was “common sense” is a clear example of reliance on an outmoded and incorrect idea about the way rape victims should, or do behave. Had the defence counsel referred solely to the episode about where the towels were (the defendant alleged that he ejaculated on the complainant's stomach, then asked her where the towels were. The complainant told him where they were, the defendant went and got a towel and wiped the sperm off her stomach), then perhaps the challenge to her credibility would have been legitimate. But to point out what the complainant did *not* do, as evidence of what occurred (especially when we now know that most rape victims do not run screaming and create a “hue and cry” as soon as possible), steps over the legitimate boundaries. In this case, we might expect a comment on this from the judge, along the lines that everyone reacts differently.<sup>103</sup>

In *Lowrie*, the prosecutor reminded the jury about the lack of legal requirement that the complainant must resist in order for it to be rape:

*This idea that the complainant in a rape case has a duty to try and stop what's going on, somehow actively protest, push somebody away, resist. That's not consent, don't buy into that. That's not what our law says. It might be what you traditionally think about when you think about a rape as being between two strangers and violent but in law, that's not what it's all about.*

The prosecutor in *Devi* suggested to the jury that not all people will respond to a rape in the same way – nor should there be an expectation that a “real” victim will fight or scream:

*The reality is that we're all different. We act and we react because of who we are. Our responses to situations are governed by our previous experiences, our ages and stages, our ability to cope with stress and pressure and our own emotional responses to the actions of others. A failure to scream, a failure to run, a failure*

103 See for example Nina Burrowes *Responding to the challenge of rape myths in court: A guide for prosecutors* (nbresearch, London, 2013) at 19 and 28 and the sources cited.



*to tell immediately is not a breach of the rules. I suggest to you that the suggestion, “This did not happen because Kaia did not scream out, did not fight, did not tell immediately” is a ridiculous one.*

Similarly, in the *Walters* prosecution closing:

*You have to, I suggest, when you’re considering this issue be very careful about applying stereotypes. The old, look, if a woman is raped, they’re going to run screaming out of the house, down the road, with their underwear and trousers off, flag down a passer-by, go straight to the police station. Well, I suggest to you that real life isn’t quite as simple or as straightforward as that at all. The reality is, is that this teenage girl was a bit unsure of what to do and how to safely extricate herself from that situation. She was embarrassed about what had happened. It’s a clear sense from her evidence that she felt that she’d perhaps brought it on herself.*

We consider that these types of submissions should be reinforced, or given more emphasis, in the summing-up, in the absence of counter-intuitive evidence or directions.<sup>104</sup>

### Distress or lack of distress

Another aspect of expected complainant behaviour that was relied on by defence counsel was the complainant’s distress, or lack of distress. Defence counsel pointed to the complainant’s lack of distress as indicating that the alleged rape was actually consensual sex. In *Walters*, defence counsel said:

*In the taxi, again, the taxi’s driver’s important. He’s independent testimony. He’s got no axe to grind. He says, “The female did not show any sign of being upset. We talked a little bit but I think she was playing on her cell phone a bit”. She said to me, I said to her, “You weren’t distressed at all,” and she said, “Oh, of course I was, yeah”. And I said, “You sure?” and then I put to her what the taxi said and then she said, “I don’t express emotion very well”. Come on. If she had been raped by this guy, the taxi driver would’ve picked it up ...*

Defence counsel went on to question why the complainant did not, at that point get the taxi to take her directly to the police or the hospital. In this way, it is closely linked with the idea that a real victim of rape will immediately raise a “hue and cry” – in other words, will be distressed and complain to the first person they see. Again, despite the complainant’s explanation for her lack of distress, defence counsel continues to suggest that it demonstrates that rather than rape, the sexual intercourse had been consensual.

Guidance for the jury about how to use evidence of the complainant’s distress was considered by the judge in summing up the case of *Harris*:

<sup>104</sup> See below at 469.



*And I also want to stress in this case, just because she went and contacted her friend Maisie after the event, that does not make what she says more credible or reliable. The fact the she was distressed when Maisie arrived could be for a number of reasons and just because somebody is distressed about something, it does not mean necessarily to say that what they are alleging did in fact happen. Because of course in the defence case they are suggesting that potentially there was regret from her about what had happened and if it is a case of her regretting what happened, that may well have caused her upset, so that may well support the defence case. On the other hand, if you accepted her version of events then the fact that she was upset may support the Crown case. So you see, it does not really take it either way. It could support either case.*

Another link can be found between a lack of distress and the intoxication of the complainant. In *Simon*, the complainant, Parvin, had been celebrating a personal achievement and became intoxicated. She claimed that the defendant, Haris Simon, took her into a public toilet and raped her. Haris claimed that the sex was consensual and the defence case was that Parvin was so intoxicated, she could not recall initiating and consenting to the sexual activity. During closing, defence counsel said:

*And what do you think about what happens afterwards because later on when she's viewed by other witnesses, she also seems, I mean they obviously describe a state of intoxication, but they also describe her being as happy, in a good mood, laughing and giggling. Even the ambulance officers. So, you might think that her behaviour after the event, I mean she may have been drinking and obviously was intoxicated, but her behaviour after the event, **that good mood, happy, is entirely inconsistent with her having just been raped in the toilets at [place]. Isn't it more consistent with a sexual activity that had been consensual?** ...*

*So, the fact she's got no memory is, in one way, irrelevant. And she's taken by the ambulance officers to the hospital, as we know, so there were people trying to help her at the scene. She doesn't make a complaint to them that she's been sexually assaulted. She doesn't make a complaint to the ambulance officers that she was sexually assaulted. **Indeed, her whole demeanour and her happiness and her good mood and her laughing suggests completely the opposite.** She doesn't say anything to the doctors at the hospital and nothing to her mother who comes to collect her that night. So the defence says that's because she, she had a real suspicion in her mind that she had wanted that sexual activity and engaged in it.*

As in *Walters* above, defence counsel tried to make much of the complainant's demeanour in combination with the fact that she did not immediately report a sexual assault. Again, the implication is that if she had been raped, the only possible way for her to react was to be distressed, cry and complain immediately. Despite the fact that the defence relied on her level of intoxication, there was no discussion on the way in which this might have impacted her mood.

This case demonstrates the difficulties for juries in assessing cases where the complainant has been drinking. The prosecution case was that Parvin was so intoxicated that she was unable to consent. In addition, she did not remember much of the incident – a factor that the prosecution used to support their theory of the case. If the jury accepted this version of events, it is perhaps unsurprising that Parvin was in a good mood immediately after the alleged rape if she was still influenced by the alcohol, and if she did not, in fact, have much memory of the incident. Even if this was not the case, her mood, on its own, cannot be indicative of whether or not she consented at the time. That does not mean it is not a relevant consideration for the jury, as part of the narrative of both the prosecution and defence. However, a direction by the judge that there is no one obvious or normal reaction to rape would remind the jury that the relevance of this evidence is to the credibility of the competing accounts, and may counter the risk that the jury resort to a generalised idea about how a complainant should react.<sup>105</sup>

### **Prosecution reliance on complainant's distress (immediately after the alleged rape) as supporting her account**

In nine of the 30 cases from the principal research, the prosecutor made some comment about the complainant's distress or demeanour in the closing statement. In five of the 10 Pilot cases, the prosecutor sought to make something of the complainant's distress in the closing statement. In four of those five cases, there was more than one reference to the complainant's emotional state. Unsurprisingly, prosecution examples focussed on situations where the complainant *did* show distress. Of course, as outlined in Chapter Seven, there were at least six cases where the complainant did not know she had been raped until later.

In the *Wilde* closing, the prosecutor described the complainant's demeanour immediately after the alleged rape as crying, looking shocked, hyperventilating and not able to get air. She specifically asked the jury whether this was consistent with a misunderstanding or with someone who had said yes to the defendant getting into her bed and then suddenly changed her mind. A similar correlation was drawn by the prosecutor in closing the *Ahmed* case. The prosecutor said:

*She talked about running out and you know she went straight to M-T W's house and said she'd been raped, said it was Ahmed, said that she'd been calling out and the police were called, right. And I know I've gone over this and you may be a bit tired of hearing it by now but those things are so consistent with a complaint of rape, a genuine complaint of rape. M-T W's saying, "Sobbing, fits of sobbing".*

105 See also Chapter Seven at 257 for a discussion of the effect of a complainant's intoxication on her ability to consent.

The prosecutor in the *Redman* closing statement correctly recognised that the jury could not “jump from her being upset to a conclusion of guilt” but goes on to suggest that the complainant’s behaviour is “completely consistent with somebody who’s just been violated”. She went on to say that the complainant “behaved as you might expect for somebody who had just had an extremely traumatic event happen to her”.

The problem with the prosecution relying on rape myth in their closings is that it tends to normalise these types of arguments and ideas about the ways in which victims behave. The difficulty, of course, is that it also a necessary part of the narrative, and of the complainant’s story, which should be put before the jury. If the complainant is distressed, and says she was distressed because she had just been raped, that is an important factor for the prosecution to point out to the jury and goes to her credibility. However, the prosecution should not go further than that, as they appear to in the *Ahmed* case outlined above, by saying that distress is consistent with a genuine complaint of rape or that you can tell the complaint in this case is genuine because this is what a genuine complaint looks like. This starts to cross from an account of the relevant evidence in this case, to reliance on a generalised stereotype.<sup>106</sup> What is necessary is for the judge to be alert to these submissions, and to direct the jury that there are many ways for complainants to react, and that a particular reaction does not necessarily mean it is more or less likely that a complainant has been raped.

The matter of the complainant’s demeanour was closely linked with the complainant’s actions in complaining about the alleged rape and any potential delay in this. It demonstrates the way in which these ideas are inter-related, and in which a number of relatively minor points might be brought together to infer something that would suggest to the jury an answer based on impermissible reasoning. In our view, the complainant’s distress, or lack of distress, should be dealt with either by an addition to the delay direction under section 127, or as a stand alone direction, to ensure the jury do not take the existence or absence of distress as indicating anything other than the fact that different people react to things in different ways.<sup>107</sup>

### ***Use of counter-intuitive evidence***

Another possible way for the prosecution to attempt to rebut the use of rape myth is by the use of counter-intuitive evidence. In *DH v R*, the Supreme Court defined counter-intuitive evidence as “evidence admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may

<sup>106</sup> The concern here is that it seems likely that distressed complainants appear more credible, hence the need to counter, not reinforce, this expectation: Faye T Nitschke, Blake M McKimmie and Eric J Vanman “A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?” (2019) 145 *Psychological Bulletin* 953.

<sup>107</sup> See above [n 23](#) and accompanying text.

intuitively hold and which, if uncorrected, may lead to illegitimate reasoning”.<sup>108</sup> In developing the Evidence Code in 1999, and recommending a provision specifically aimed at allowing expert evidence about the behaviour of a sexually abused child, the Law Commission explained:<sup>109</sup>

*The purpose of such evidence is not diagnostic. Rather, the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and therefore be better able to evaluate it.*

*Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called “counter-intuitive evidence”: it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant’s behaviour neither proves nor disproves that he or she has been sexually abused.*

While the provision proposed by the Law Commission did not appear in the Evidence Act 2006 and counter-intuitive evidence has primarily been used in cases involving victims who were children at the time of the alleged offending, there is nothing to prevent it in cases of adult complainants. As discussed in Chapter Six, the Supreme Court has confirmed the Court of Appeal’s approach that counter-intuitive evidence may be admissible under section 25 of the Evidence Act, and outlined the admissibility of that evidence.<sup>110</sup>

For our purposes, many of the themes discussed in this chapter could be met by counter-intuitive evidence. In particular, evidence about delay in disclosure and method and mode of disclosure, as well as evidence about complainant behaviour might be helpful in dispelling some of the myths we have identified as being present in current trials. In none of the 40 cases in this research was counter-intuitive evidence admitted nor related directions given.<sup>111</sup>

In the 2015 report on trial processes in sexual cases, the Law Commission discussed the purpose and use of judicial directions, particularly in sexual violence cases:<sup>112</sup>

*Judicial directions may be particularly important in sexual violence cases to counteract stereotyped thinking or misconceptions about violence which individual jurors may bring with them into trial. Hence in the literature they are often discussed in terms of their potential as a form of juror education;*

108 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2].

109 New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C110]–[C111].

110 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625. See Chapter Six at [240](#).

111 Except regarding section 127 directions regarding delay: see above at [405](#).

112 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.54] (footnotes omitted).

*that is, a way of informing jurors about the stereotypes or misconceptions about sexual violence that they should avoid when making their decision. Guidance must always be tailored to suit the factual issues – giving jurors a number of “conventional” or generic directions without noting the relationship to the facts is not helpful and should be avoided.*

In 2015 the Law Commission did not recommend the inclusion of any new judicial directions about sexual violence without further research. However, in its second review of the Evidence Act 2006 in 2019, the Law Commission explicitly addressed the use of judicial directions to address juror misconceptions about sexual (and family) violence. The Law Commission recommended that the Act should be amended to expressly provide that a judge may give a direction to address any such misconceptions.<sup>113</sup> They considered that sample directions should be developed, with enough funds provided to the Institute of Judicial Studies for these to be contained in a publicly accessible jury trials bench book.<sup>114</sup> The Law Commission recommended, as a starting point, that sample directions be developed to address the following myths related to sexual violence:<sup>115</sup>

- ▶ A complainant who dresses ‘provocatively’ or acts ‘flirtatiously’ is at least partially responsible for the offending.
- ▶ A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- ▶ “Real rape” is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.

113 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) Recommendation 21.

114 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) Recommendation 22.

115 This recommendation was accepted by the Government and forms part of the Sexual Violence Amendment Bill 2019 (clause 14):

**Section 126A Judicial directions about misconceptions arising in sexual cases**

- (1) In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases.
- (2) Misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to, –
  - (a) a complainant is at least partially responsible for sexual offending if they dress provocatively, act flirtatiously, drink alcohol, or take some other drug;
  - (b) sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance;
  - (c) sexual offending always involves force or the infliction of physical injuries.
- (3) No direction is necessary or desirable if the misconception has already been addressed adequately by evidence (for example, evidence admitted by agreement under section 9(1)), and this section does not limit or affect –
  - (a) section 127 (delayed complaints or failure to complain in sexual cases);
  - (b) any regulations made under section 201(m) (warning or informing jury about very young children’s evidence).

- ▶ It is not rape unless the offender uses force and/or the complainant suffers physical injuries.

We support the adoption of these sample directions, although note that further directions will also be appropriate (see Chapters Seven and Eight).<sup>116</sup>

We consider, however, that for them to be of maximum benefit, sample directions should be tailored to the particular facts in issue, rather than general statements about what rape is, or is not. As noted, the difficulty in this area is in assessing the line between an impermissible generalisation, and the impact a point may have on the particular facts in issue. We recommend that the approach taken by the Judicial College of England and Wales in drafting the example directions found in the *Crown Court Compendium* be followed, where the samples specifically contemplate the judge summarising the particular points of evidence that are relevant in this case. In addition, if judicial directions are to be effective, they must be used appropriately, with judges being supported to identify when and how to use them.<sup>117</sup> If additional sample directions are developed, we support ongoing training for judges in identifying, and responding appropriately to rape myth used in trials.

While we agree that judges should have legislative and judicial support to direct the jury more specifically about rape myths, it is important to note that this is unlikely to be entirely effective in countering rape myth. Research with mock juries has shown that judicial directions may not always be effective. In a study of mock jurors, Louise Ellison and Vanessa Munro found a positive connection between a judicial instruction and the mock jury's analysis of the calm demeanour of the complainant while giving evidence, and the delay in reporting.<sup>118</sup> Jurors who had heard the judicial direction (or those who were exposed to expert evidence) were more willing to question the relevance of a period of delay before reporting, or the connection between the emotional presentation of the complainant's evidence and her credibility and veracity of her account.<sup>119</sup> However, judicial instruction (and expert evidence) did not have the same impact in relation to the complainant's lack of physical resistance.<sup>120</sup>

116 See further Recommendation 36 in Chapter Ten.

117 See observational research undertaken in England where the use of the warnings contained in the *Crown Compendium* were not always used where appropriate, and where used, were sometimes given in a perfunctory manner or without actually correcting misleading stereotypes: Jennifer Temkin, Jacqueline M Gray and Jastine Barrett "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study" (2016) *Feminist Criminology* 1 at 16–17.

118 Louise Ellison and Vanessa E Munro "Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 *British Journal of Criminology* 363 at 374. The same was true of jurors who received expert evidence about these factors.

119 At 374.

120 At 374.

Counter-intuitive evidence was allowed in the case of *HKR (CA792/2012) v R*.<sup>121</sup> R appealed his conviction for raping his adult daughter at the time of her 21st birthday party. At trial Dr Blackwell gave evidence correcting misconceptions about rapists (rapes are in fact more often committed by people known to the victim than by strangers) and also about victims (that people respond to events in different ways and there is no particular expected reaction).<sup>122</sup> While no complaint was made about the content of Dr Blackwell's evidence, the appellant criticised the judge's summing-up about the use that could be made of the evidence. The Court of Appeal accepted that the judge did not specifically direct the jury not to misuse the evidence. However, this did not matter as there had been a clear direction as to the proper use of the evidence. The judge had reminded the jury this was not evidence about the particular case. The judge also reminded the jury that Dr Blackwell had accepted she was not commenting on whether this complainant was acting consistently or inconsistently with how a rape victim would react, and noted that Dr Blackwell accepted that the actions of the complainants were relevant to the jury's assessment of the case.<sup>123</sup>

The Court of Appeal went on to note some comments in the prosecution's closing address that caused some concern. During the closing address the prosecution submitted that:<sup>124</sup>

*[T]he defence reliance on D's ongoing contact with her father, and her failure to immediately complain, were "no more than perpetuations of rape myths".*

The Court of Appeal characterised this as a misuse of Dr Blackwell's evidence. The expert evidence went no further than debunking the myth that there is only one way for a complainant to react, in other words, that victims will always raise a hue and cry and will cease contact with the offender. A defendant can still submit that, in this case, and given what is known about the complainant, these actions are signs that it is not true. The prosecution cannot simply reference the counter-intuitive evidence and say the defendant is perpetuating the myth. Instead, it must rely on the complainant's evidence about why she acted as she did, reinforced by the evidence that victims react in different ways.<sup>125</sup>

This comment by the Court of Appeal demonstrates the difficulty in using counter-intuitive evidence to address rape mythology in sexual violence trials. While it is possible to talk in generalities, the Crown and defence both need to be able to address the evidence in the specific case in front of the jury. The risk is that juries will overlook or ignore counter-intuitive evidence if the submission is then made to them that in this specific case, the myth or misconception being dismantled actually **does** fit the evidence.

121 [2013] NZCA 372, [2013] NZAR 1202.

122 *HKR (CA792/2012) v R* [2013] NZCA 372, [2013] NZAR 1202 at [7].

123 At [12].

124 At [14].

125 At [14]. See also *Paul v R* [2019] NZCA 390 at [26].

In the case of *Smythe* the prosecution made a pre-trial application to offer counter-intuitive evidence about delayed reporting. This was to counter evidence that the complainant's friend and colleague walked in on the alleged rape, and the complainant did not make a complaint at that point. The application was turned down,<sup>126</sup> and, in closing, defence counsel said:

*Not long before she finished her closing address my learned friend made a comment that prosecutors sometimes make, and normally it's a fair comment, that there's no rule book which a complainant has to follow, that tells the complainant, tells the world how somebody who is in the situation of being a rape victim should act. There's no consistent pattern, there's no rule that you should do this or shouldn't do that. But maybe somebody should tell Kavka [the complainant] that if you're going to say that you've been raped you shouldn't be seen by one of your closest friends to be enjoying yourself in the act. You shouldn't be seen by one of your closest friends to have your legs wrapped around his naked back. You shouldn't be seen by the same friend to have your arms around his neck. You shouldn't moan with pleasure so loud that the woman in the room next door turns her TV up to drown out the noise. You shouldn't admit the next day to a fellow [occupation] that you "got with him". You shouldn't slip up in your police interview and say, "I didn't want people to know that I wanted to have sex with him". It may be that just for this trial somebody should have made the rule book and she should have read it.*

Even if counter-intuitive evidence had been allowed in this case about the fact that complainants react in different ways, including during the alleged rapes, defence counsel would still have been permissible make these comments. A statement such as this can be both based on the evidence, and also on an unconscious expectation about the way the complainant has behaved. However, if the jury also had the benefit of counter-intuitive evidence in this case, they would have had an independent reference point for the idea that complainants do not always react in one way. The effect of the counter-intuitive evidence may have been reduced by defence counsel's acceptance of the idea that people react in different ways in a general sense, but that in this case it did not apply. However, the value of counter-intuitive evidence in this situation would have been to give the jury a broader context, and to offer a viable alternative narrative for them to assess.

Despite these potential problems, we support the use of counter-intuitive evidence – and in particular, the Law Commission's recommendation in its 2015 report *The Justice Response to Victims of Sexual Violence* that section 9 of the Evidence Act 2006 be used to admit agreed expert evidence or a written statement for the jury dealing with myths and misconceptions around sexual violence.<sup>127</sup> A further benefit of this type of evidence is that the jury would

126 See Chapter Six at 241.

127 New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 121, Recommendation 29.



be able to refer back to it during their deliberations as it would form part of the transcript if an expert witness was called, or there would be a statement in writing under section 9 of the Evidence Act 2006. We consider that counter-intuitive jury directions should also be supplied to the jury, along with the question trail. However, increased use of counter-intuitive evidence on its own will not eliminate the need for judicial direction and control about the use of such evidence and its impact on use of sexual violence myths in trials.

Even with the prosecutor's duty to push back against remarks made by the defence in closing, or to bring them to the attention of the court, the real control remains with the judge. This is partly due to the judge's role – after all a prosecutor may bring up a comment made by the judge, but the judge is free to ignore the prosecutor's objection. Secondly, whatever is said by the prosecution, the judge is the authority on the law in a trial, and the jury is frequently told that by the judge in the summing-up. In a relatively typical example of this, the judge in a Pilot case (*Junn*) said in summing up:

*The functions of the Judge and the jury. Throughout the trial, our functions have been, and they remain, quite different. It is my duty to regulate the conduct of the trial, to rule on questions of evidence and procedure and to direct you upon the law applicable to this case. You must accept what I tell you about the law.*

With that in mind, while prosecutors have a role here in dismantling reliance on outdated ideas, the judge is the best placed to ensure the jury is not left with an erroneous impression of the types of permissible reasoning processes.

We are of the view that if counter-intuitive directions are developed, they should be given to the jury as early as possible in the trial, perhaps as part of the opening remarks from the judge. This allows the information to be available to the jury in advance of any evidence and before the development of an evaluative process, which might be difficult to later disrupt.<sup>128</sup> Ideally, the directions will be provided in writing and could be referred to at various points during the trial, but at least once more during the summing-up.

### Judges' role in controlling reliance on rape myths

There is some appellate authority suggesting that judges should ensure that counsel do not refer to outdated views or attempt to rely on rape myth in closing addresses. The Court of Appeal in *E* (CA113/2009) v *R* stated:<sup>129</sup>

128 See Jonathan Clough and others *The Jury Project 10 Years On – Practices of Australian and New Zealand Judges* (The Australasian Institute of Judicial Administration Incorporated, Melbourne, 2019) at 70; Amelia Erin Retter "Thinking Outside the (Witness) Box: Integrating Experts into Juries to Minimise the Effect of Rape Myths In Sexual Violence Cases" (2018) 49 Victoria University of Wellington Law Review 157 at 164.

129 [2010] NZCA 280 at [51]–[53].

In Mr Pyke's submission, this passage was careless, pointless (because the defence was denial), and highly offensive in the context of a case involving the alleged rape of a 14-year-old girl. Another submission from trial counsel was:

Children at 12 and 14, I submit to you, are very much in the now situation. Two dimensions with not a lot of depth and that's what happens. And, indeed, these are children. It may even be a touch of fantasy but that's for you in terms of the common sense of how you know children. But it's always very difficult and I repeat, hopefully for the last time, that we are in the context here of not only a family but a family reunion. There are lots of people that know each other very well and things, it's very difficult.

In Mr Pyke's submission this passage appears to invite the jury to acquit because children (according to Mr Clews [trial counsel]) have shallow personalities and are prone to fantasy (presumably, including about rape and sexual abuse), and because there is family influence in the case. Again, there was no evidential foundation for this submission; it was not put to either complainant that they merely imagined the events. In Mr Pyke's submission, Mr Clews' facile statements, based on his personal opinion about children, may well have alienated some of the jurors, particularly any jurors who were parents or grandparents.

*We agree that these passages of Mr Clews' address were based on outdated stereotypes and that they were inappropriate. We see them as an attempt to play on the possibility of the existence of similarly outdated views being held by some jurors. Competent and responsible counsel ethically should not make such submissions.* We also accept Mr Pyke's submission that the type of comments made could have been offensive to some jurors. We doubt that the direction to jurors to put emotion to one side would have met any feelings of irritation that shallow submissions such as this may generate. It would be difficult for jurors to put that irritation to one side. They are not directed to, and it is natural, maybe even unavoidable, that they will associate counsel's conduct with the client.

There is an argument that use of such submissions is not ethical, and could therefore be controlled through the use of the rules of professional conduct. Rule 13.5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that a "lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's **personal opinion** on the merits of that evidence or issue". As many rape myths have little or no basis in fact, it could be argued that instead they are representative of the lawyer's "personal opinion". If such claims are in fact personal opinion, albeit as a mechanism to allow defence counsel to carry out their role, it may be that rule 13.5.4 has a place in this debate. However, it has been argued that the Law Society is not the appropriate forum for controlling the statements of personal opinion, but rather that such issues should be dealt

with by quick action by the trial judge, on the basis that this is the traditional and appropriate mechanism for such control.<sup>130</sup> While this undoubtedly has the benefit of being dealt with on the spot, and the issue clarified for the jury in the relevant trial, our study suggests that the more subtle use of some stereotypes are not routinely being challenged by judges.

In our view, there is a clear need for judges to take an increased role in addressing unsustainable submissions. While it may be a matter of opinion as to what amounts to a clearly unsustainable argument, continued and ongoing education should assist in this regard. An increased judicial role in this way would not run counter to the principles of adversarialism, but rather ensure that juries were focussed on the facts and evidence of each particular case, rather than having recourse to generalised stereotypes. More broadly, an increased judicial role in terms of addressing situations where rape myth has arisen in trials fits with changing notions about active judicial case management. It is also consistent with the role of the judge set out in the Pilot's *Guidelines for Best Practice* to enquire widely and make appropriate directions at the case review hearing.<sup>131</sup>

### ***Concluding thoughts and proposals***

In this chapter, we documented the reliance on rape mythology and reinforcement of the “real rape” schema during closing arguments, and the extent to which the judge responded to this reliance in the summing-up. Given that research establishes that jurors rely on myths, stereotypes and generalisations about rape, including belief in “real rape”, it is important to identify what more could be done to disrupt this reliance, especially during what the judge tells jurors about the law and how to approach their task. Prior to a thematic analysis of the types of mythology deployed, we considered how current directions and aspects of the summing-up process could be improved in the context of rape cases, even without the development and use of counter-intuitive directions.

Our first observation was that there is lack of consistency regarding the approach to and content of summings-up, even in cases that have very similar fact patterns and the issues at trial were the same. Matters that we consider need to be included in *all* summings-up in adult rape cases when the issue is consent are: a reminder of what is not evidence (the content of questions and counsel submissions); an example of how to draw an inference drawn from the facts of the case; and that there is no need, as a matter of law, for there to be independent evidence or corroboration of the complainant's version of events. We also noted differences in the structure of the summings-up, and the level of repetition of counsel arguments. We recommend that the general approach should be for the judge to provide a short summary

130 Richard Mahoney “Lawyers’ Statements of Personal Opinion to the Court” (2015) 14 Otago Law Review 147 at 148.

131 Ministry of Justice *Sexual Violence Court Pilot: Guidelines for Best Practice* <http://www.districtcourts.govt.nz/assets/Uploads/Publications/26a11ed789/Best-Practice-Guidelines.pdf> at [12].

of the evidence relied on by each party, as part of the discussion of the relevant law. Finally, we are concerned about jurors being instructed to rely on their “common sense”, and the increased use of repetition warnings with regard to complaint evidence, even in cases where there are not multiple previous consistent statements.

With regard to the content of closings, there was significant deployment of rape mythology, including by Crown counsel. While the prosecutor sometimes anticipated and pre-empted defence counsel’s reliance on rape mythology, they also relied on aspects of the “real rape” schema in particular, when it assisted the Crown case or bolstered the complainant’s evidence. This occurred most often with regard to the time taken to complain to the police about the alleged rape, and with regard to how distressed the complainant was when she first told someone what had happened – even though the social-science research is clear that not all people complain immediately nor will they necessarily appear traumatised or upset. We also noticed that distress, or the lack of distress, either at the time of the alleged rape, or when giving evidence, was emphasised in the closing arguments. While most of the judges warned the jury to be careful of making assessments of complainant credibility based on demeanour, no information was provided to the jury about the range of responses and presentations that rape victims may have.

There was limited use of the statutory direction about the meaning of delay in section 127 of the Evidence Act 2006, which given the high numbers of early complaints (to friends or family members) in the 40 cases was not unsurprising. However, challenges were based on the choice of person the complainant first talked to, and the time taken to involve the police – neither of which are responded to by the terms of section 127. We therefore recommend that section 127 is repealed and replaced with a counter-intuitive direction that is wider in scope and more responsive to the meaning made of how, when and to whom a complainant first talks.

Other rape myths that were used in defence closings in order to suggest that there was no rape (because the complainant had consented and is now lying) included: the absence of force or threats used by the defendant; the absence of injuries to the complainant; the place in which the alleged rape occurred (her bedroom); the clothing choices of the complainant; the lack of physical resistance by the complainant; the level of her intoxication (and therefore unreliability); and contact with the defendant following the alleged rape. In some cases, the defence also suggested that the jury take into account the high level of false rape complaints in coming to their decision, and in many, if not all cases, the defence had a theory about why the complainant was lying.

We noticed very little judicial countering of such deployment of myths, even in cases where the prosecution had provided an alternative narrative. We are therefore of the view that the development of a range of counter-intuitive directions, beyond those currently included

in the Sexual Violence Legislation Bill 2019,<sup>132</sup> is a highly desirable and overdue initiative to support judicial best practice in adult rape cases. We recommend that any such directions should be given to the jury, in writing, or in video format, as early as possible in the trial process, before any evidence has been offered.

While we noticed a number of cases in which the prosecutor attempted to pre-empt or forestall defence reliance on rape mythology in closing arguments, we consider more could be done by the Crown to resist (and not reinforce) use of stereotypes and contestable assumptions about complainant behaviour. This could include development and use of section 9 statements that contain “counter-intuitive” information of relevance to the particular case. As part of the recommended “enhanced case review hearing” (as has been occurring in the Pilot),<sup>133</sup> we also consider that pre-trial discussion of the likely scope of counter-intuitive directions may assist in the framing of the closing arguments of both parties.

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132 See Recommendation 36 in Chapter Ten.

133 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at 186–187.

## CHAPTER TEN

## PROPOSALS FOR CHANGES TO LAW AND PRACTICE

*If you're a good lawyer, you should be able to provide your evidence without saying mean things.<sup>1</sup>*

The initial focus of the principal study was to investigate the reasons why the process of giving evidence as a complainant in a rape trial remains re-traumatising despite decades of targeted reform. The important related aim was to develop reform options that might better reduce the negative impact of testifying. During the course of this work, the commencement of the Sexual Violence Court Pilot provided an opportunity for a comparator piece of work, to document the differences between aspects of the Pilot model and the trial practices in other cases.

One of the aspects of the projects' methodology was to test the theory that deployment of rape mythology and the "real rape" schema during the questioning process, especially cross-examination, contributes to complainants' reported re-traumatisation and concerns about the fairness of the trial process. Our overall conclusion about the trial process in adult rape cases is that it is not only the nature and content of cross-examination that, at times, unnecessarily contributes to complainant distress. This research demonstrates that it is *also* the marked absence of judicial control over the questioning process and the lack of consistent application of the rules of evidence and procedure that indicate further political attention to the prosecution of sexual cases is warranted. In other words, while the primary focus of this research was on reform-resistant cross-examination, and its ongoing impact on the negative experiences reported by complainants, our analysis of all of the complainants' evidence as well as the closings and the summings-up, exposes that the trial process *as a whole* is resistant to legal and procedural change. Unfortunately, this conclusion replicates and reinforces the outcomes of many other inquiries into the prosecution of rape. These inquiries conclude that it is societal beliefs that must be changed, in order to see consequential change to the decision-making processes in rape trials.

<sup>1</sup> Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) Stakeholder, at 89.

While we accept that this research is a further reminder that wider community-based change,<sup>2</sup> rather than just law reform, must occur,<sup>3</sup> along with the development of alternatives to prosecution,<sup>4</sup> this work does provide real examples of both best practice and practices in need of reform. In this chapter, we set out change options based on the findings of both studies, highlight the points of comparison and report on the insights provided during the consultative workshops. The chapter begins, by way of context and for ease of reference, with a summary of our observations about the differences between the cases in the principal research and those in the pilot study. The first group of proposals is then set out in a chronology – from pre-trial practice through to aspects of summing-up and jury directions. We then outline the implications of the findings for education and development programmes for judges and counsel and consider the need for amendment of procedural and substantive law. Cross-referencing is provided to the relevant chapters where the observations supporting the proposals are discussed.

### ***Summary of differences during the trial process in the Sexual Violence Court Pilot***

Throughout the various chapters in this book, and as part of a number of the recommendations listed below, we make observations about the differences between the trial process in the cases in the principal research and those in the pilot study. In order to provide an accessible point of reference to these comparisons, we provide a brief summary below. This is a summary of **differences**, so if any matter of trial process captured by the scope of our access (see further Chapter Two) is not mentioned, this is because there was no observable or material difference between the two sets of cases.

- (1) Judicial interaction with the complainant was more common, more frequent and with greater content – including: greeting the complainant in the CCTV room prior to her giving evidence, as well as explanations of process during her evidence, greater levels of response to distress and/or confusion and acknowledgement of the significance of her efforts at the conclusion of her evidence in the Pilot cases.<sup>5</sup>

2 For example Barbara Krahé and Jennifer Temkin *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, Oxford, 2009); Anna Carline and Clare Gunby “‘How an Ordinary Jury Makes Sense of it is a Mystery’: Barristers’ Perspectives on Rape, Consent and the Sexual Offences Act 2003” (2011) 32 *Liverpool Law Review* 237 at 249.

3 See for example Melanie Randall “Sexual Assault Law, Credibility and ‘Ideal Victims’: Consent, Resistance and Victim Blaming” (2010) 22 *Canadian Journal of Women and the Law* 397 at 400: “[F]eminist advocacy and education to end sexual violence in women’s lives can only ever look to the law as a partial solution – an important yet limited strategy in a broader struggle to effect social change ... [L]aw is a necessary, but not sufficient, site for remedying the problem of sexual assault”; Yvette Russell “Woman’s Voice/Law’s Logos: The Rape Trial and the Limits of Liberal Reform” (2016) 42 *Australian Feminist Law Journal* 273 at 296: “[I]t is important to recognise that work on reforming the trial process is but one feminist task of many”.

4 See for example New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

5 See Chapter Four at 67.

- (2) All complainants in the Pilot cases utilised an alternative way of giving evidence, compared to 70% of the complainants in the cases in the principal research.<sup>6</sup>
- (3) There was less admission of irrelevant evidence in the Pilot cases – especially concerning information about the complainant or her family (such as employment status of her partner, her previous convictions, number of children, educational qualifications). This may have been a consequence of the case management process. Further, although there were no differences regarding the decisions as to the **scope** of section 44(1) of the Evidence Act 2006 (sexual history evidence), the application of the admissibility test in section 44(3) was more consistent and less reliant on contestable connections between sexual experience and credibility, which occurred in a number of cases in the principal research. Notably there was no difference between the two studies regarding the breaches of section 88 (evidence of the complainant’s occupation).<sup>7</sup>
- (4) Judicial intervention during the complainant’s evidence in reliance on section 85 of the Evidence Act 2006 was more frequent on average in the Pilot cases, and was sometimes accompanied by the judge’s explicit reference to a change in approach, but the **types** and **points** of intervention were no different.<sup>8</sup>
- (5) In general terms, directions on the law were more consistent across the Pilot cases, and some aspects of the Pilot directions indicated adjustments based on material included in the development programme provided for judges in the Pilot.<sup>9</sup>

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6 See Chapter Two at [33](#).

7 See Chapter Six at [198](#).

8 See Chapter Eight at [358](#).

9 In particular, material identifying common misconceptions. See also Chapter Seven at [311](#).



## *Reform proposals relating to pre-trial matters*

### The investigative process

#### Recommendation 1

Consideration is given to testing the blood alcohol level of a complainant who reports being intoxicated at the time of the alleged offending and contacts the police or health professionals within 96 hours.

Evidence of the blood alcohol level of the complainant may provide more forensically useful information regarding the level of intoxication of the complainant at the relevant time, as long as accompanied by expert evidence from a toxicologist.<sup>10</sup>

#### Recommendation 2

A complainant should not undertake an evidential interview until two full sleep cycles have occurred since the alleged sexual violence.

Trauma-informed understandings of memory and event processing and retrieval, indicate that requiring fulsome recall of the offending and preceding events too close in time can result in gaps in the narrative (and therefore in the investigation) that may also be exposed as inconsistencies at trial.<sup>11</sup>

#### Recommendation 3

Specialist interviewers should attend more consistently to the content and length of evidential video interviews (EVIs) in order to prevent the need for extensive additional examination-in-chief at the trial.<sup>12</sup>

<sup>10</sup> See Chapter Seven at [257](#). Given there are variations in how different people process alcohol, the impact of eating and time delay, it is currently unclear to what extent an expert could say very much about the complainant's likely capacity to consent, but could say something about likely visible impacts of intoxication at the level recorded. More work needs to be done in this area given its significance in the context of rape trials, and we welcome news of the upcoming research by Julia Quilter and Luke McNamara: "Intoxication Evidence in Rape Trials: A Double-Edged Sword?" <https://rms.arc.gov.au/RMS/Report/Download/Report/a3f6be6e-33f7-4fb5-98a6-7526aaa184cf/208>

<sup>11</sup> See Chapter Eight at [331](#).

<sup>12</sup> See Chapter Four at [105](#). See also Recommendation 12.

#### Recommendation 4

Consideration is given to the development of protocol by the police, in consultation with Crown Law and the Criminal Bar Association, regarding the gathering and use of sensitive and confidential information about the complainant (including social media profile, cell phone contents, medical history), to ensure that irrelevant material is not unnecessarily disclosed to the defendant.

Concern was expressed at the consultative workshops about the lack of consistent treatment and handling of such information (including whether appropriate consideration of admissibility occurs, or can occur in a meaningful way, at trial) and the consequential impact on attrition rates, once complainants become aware of the possible dissemination of private material. Such a protocol will also have implications for the process of non-party disclosure.

We note that while this research did not indicate significant procedural or admissibility issues regarding material held by non-parties (such as therapists or doctors),<sup>13</sup> we believe it remains important to consider the provision of independent counsel to assist with decisions concerning non-party disclosure, as well as continued effective support to complainants during such a process.<sup>14</sup>

#### Preparing for trial; case review hearing

#### Recommendation 5

Consideration is given to amending the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* regarding the nature and scope of **both** the initial and pre-trial meeting with complainants to include reference to the need to engage in rapport building.<sup>15</sup>

The prosecutor could helpfully become familiar with the complainant's personal circumstances, particular vulnerabilities and communication style, including her familiarity with a sufficient range of terms to describe the sexual acts alleged. For this reason, and others, the pre-trial meetings should be with the lawyer who will be the prosecutor at the trial.<sup>16</sup>

13 But see for example the discussion of disclosure of the complainant's medications – Chapter Six at 208.

14 As is provided in other jurisdictions, including New South Wales, Canada and Ireland: see further Elisabeth McDonald "Resisting defence access to counselling records in cases of sexual offending: Does the law effectively protect clinician and client rights?" (2013) 5 *Sexual Abuse in Australia and New Zealand* 12.

15 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.1]. See Chapter Four at 81.

16 The importance of continuity of contact with the same professionals has been noted recently in Joyce Plotnikoff and Richard Woolfson *Falling short? A snapshot of young witness policy and practice* (Lexicon Limited, 2019) <https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf> at [3.6].

### Recommendation 6

Consultation on ways to assist complainants to identify or name and become comfortable with questions about body parts should be undertaken by the police and Crown Law, in order to develop a range of best practices or options that could be included in the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*.<sup>17</sup>

### Recommendation 7

Consideration is given as to how specialist community psycho-social support services and prosecutors can co-operate to ensure that complainants receive adequate information about going to court and understanding the questioning process, as well as being provided with the psychological support to prepare for being a witness.

In particular, support workers may assist in identifying the need for certain types of assistance – including the most helpful way for the complainant to give evidence and whether she has any learning, language or communication difficulties that should be accommodated.<sup>18</sup>

Preparation for cross-examination will be especially important when the complainant's EVI is her evidence in chief, and there should be some attention given to the “hand over” from the Crown to defence counsel.<sup>19</sup> The Crown Prosecution Service for England and Wales provides a resource to help prosecutors manage the boundaries of their role in this regard.<sup>20</sup>

### Recommendation 8

If the complainant's evidential interview was recorded but will not be her evidence in chief, the complainant shall view a copy of the transcript of the EVI in advance of the trial.<sup>21</sup>

The purpose is to ensure she can read it, knows what it looks like and can navigate its contents – in the event that it will be used at trial for the purposes of refreshing memory or cross-examination on inconsistencies. This process should ensure that cross-examination is undertaken by reference to the transcript (in document form) rather than to the audio-visual record of the EVI.

<sup>17</sup> Chapter Four at 90.

<sup>18</sup> Chapter Four at 95.

<sup>19</sup> Chapter Four at 107.

<sup>20</sup> <https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court>

<sup>21</sup> See Chapter Four at 94 and at 98.

### Recommendation 9

Consideration is given to amending paragraph 7.14 of the *Solicitor-General's Guidelines for Prosecuting Sexual Violence* to include reference to the prosecutor advising the complainant that she may ask to refresh her memory from her pre-trial statement or the transcript of the EVI.<sup>22</sup>

### Recommendation 10

Further consultation must be undertaken in order to develop agreed protocols and guidance on the practice of pre-trial recording of the cross-examination and re-examination of the complainant for use in jury trials, in advance of implementation.<sup>23</sup>

There are significant challenges regarding the fairness of pre-trial recording of cross-examination for the defence case if undertaken close in time to the reporting of the alleged offence.<sup>24</sup> The likelihood in most cases of further questioning at trial, both examination-in-chief and cross-examination, undermines one of the primary purposes of allowing earlier resolution from a complainant's perspective.

While early cross-examination may be also preferable in terms of recollection of the events, we favour recording of cross-examination close in time to the trial, as is the case in other jurisdictions. This process could be used in combination with fast tracking of sexual cases (as in the Pilot) and agreed "ground-rules".<sup>25</sup> Pre-recording all of the complainant's evidence close to the trial (including evidence in chief and re-examination) has important potential benefits, such as the possibility of more judicial intervention in questioning<sup>26</sup> and greater

22 See Chapter Eight at 343.

23 See clause 14 of the Sexual Violence Legislation Bill 2019.

24 See for example the letter from the New Zealand Law Society's Criminal Law Committee to the Ministry of Justice regarding the Law Commission's recommendation on pre-recording: [https://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0005/136733/1-MoJ-SV-reforms-re-Law-Commission-recommendations-11.10.18.pdf](https://www.lawsociety.org.nz/_data/assets/pdf_file/0005/136733/1-MoJ-SV-reforms-re-Law-Commission-recommendations-11.10.18.pdf) at 3 ff; Scott Corish "Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses" (2015) 39 Criminal Law Journal 187.

25 See New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [10.43] and Recommendation 12 below.

26 "[Judges] don't want to be criticised as being interventionists so they will tend to be the arbiter who doesn't really get involved because of a fear the, on appeal, there is going to be some criticism that they have interfered too much and they have interfered with the way that the defence counsel has run [the case]. So I think they're a wee bit hamstrung in my view as well": Defence counsel quoted in Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 68.

complainant support, given that any prejudicial material can be edited out.<sup>27</sup> Any evidential issues that have not already been determined can also be decided without impact on the jury. In the event of a re-trial, it may be possible to use the same recording, edited or added to, depending on the reason for the successful appeal.

However, despite these advantages, an editing process (even with consent) will invariably give rise to appeals in some cases, which will delay the start of the trial. There may well be disagreement regarding whether displays of complainant distress should be edited out, for example. There are also risks that with any delay comes the likelihood of a change in counsel, and the consequential (but undesirable from the complainant's perspective) need for re-recording or for additional cross-examination at trial.

Any agreed protocol will need to include how the defendant can be present at the recording of the complainant's evidence, perhaps by observing with the judge from another room.<sup>28</sup> Concerns were expressed at the consultative workshops that having all of the complainant's evidence recorded would depersonalise her, which may impact on juror perceptions.<sup>29</sup> Practical and technological issues, such as whether the recording played would also capture the defendant's response to the complainant's evidence, how to ensure safety of storage and ease of access to the recordings, how to manage jury questions, as well as whether a recording session would be viewed as more easily rescheduled and not prioritised (causing delays), were also highlighted. Some contributors asked whether any "gap" between the recording and trial may actually benefit the defendant in terms of time available in which to respond (if giving evidence himself).

If pre-trial recording as a legislated option is progressed, we suggest it be the subject of a Pilot trial, as part of the Sexual Violence Court. The majority of attendees believed that other practices, such as fast-tracking, increased judicial oversight, effective use of the case review hearings and education and development programmes for judges and trial counsel would be more responsive to complainant concerns and more efficient.

27 See also Jill Hunter "Battling a Good Story: Cross-examining the Failure of the Law of Evidence" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating theory, research and teaching* (Hart Publishing, Oxford, 2007) 261 at 288; Emily Henderson, Christopher Heffer and Mark Kebbell "Courtroom Questioning and Discourse" in Gavin Oxburgh and others (eds) *Communication in Investigative and Legal Contexts: Integrated Approaches from Forensic Psychology, Linguistics and Law Enforcement* (Wiley Blackwell, 2015) 181.

28 As was the case in *R v Aitchison* [2017] NZHC 3222 at [19] and [25] (regarding pre-trial cross-examination and the use of a communication assistant in a case involving allegations of sexual violence). See also Recommendation 12.

29 See further Vanessa E Munro *The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review* (Social Research Series, Scottish Government, Edinburgh, 2018).

### Recommendation 11

The prosecutor should consider in every case the potential use and content of a statement of agreed facts (section 9 of the Evidence Act 2006).

In cases where penetration is not at issue, such a statement would prevent the need for the complainant to give evidence on that matter,<sup>30</sup> or clarify for the judge and jury what terminology the complainant may use to describe body parts. These statements may also be used to obviate the need for experts to give counter-intuitive evidence,<sup>31</sup> or evidence on the use and conventions around social media use.<sup>32</sup>

Statements may also provide a less traumatising way to offer propensity evidence about the complainant, including evidence about her sexual experience.<sup>33</sup> Such statements should not include irrelevant or unfairly prejudicial material and, we consider, should be given to the complainant at the time they come into the record so that she is aware of their scope and can be referred to their content during her evidence, as needed.

### Recommendation 12

An enhanced case management process, such as that used in the Sexual Violence Court Pilot,<sup>34</sup> should be used in all cases involving allegations of sexual violence,<sup>35</sup> and should be recorded for potential research and training purposes. There was significantly less admission of irrelevant evidence in the Pilot cases, which may have been a product of more pre-trial discussion.<sup>36</sup>

Case review hearings should include consideration of: admissibility issues (particularly section 44, non-party disclosure requests, information about the complainant's occupation, prescription medication and any mental health issues);<sup>37</sup> the scope and use of any section 9 statements of agreed facts; the provision of appropriate support to the particular

30 See Chapter Four at [90](#).

31 See Chapter Six at [240](#).

32 See Chapter Four at [89](#).

33 *Goldfinch v R* [2019] SCC 38 at [75].

34 See <http://www.districtcourts.govt.nz/assets/Uploads/Publications/26a11ed789/Best-Practice-Guidelines.pdf> at [7]–[19].

35 Contra Crown Law Solicitor-General's *Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [12.4].

36 However, we did not have access to any material from the case review discussions so this is an inference based on our analysis of the trial data.

37 See Chapter Six at [208](#).

complainant (alternative ways; communication assistance; more than one support person); and the scope and nature of questioning – including the application of the controls in section 85 of the Evidence Act 2006 and any implications on the defendant’s duty under section 92 of the Evidence Act 2006.<sup>38</sup>

Pre-trial consideration should also be given to the content of an EVI – including the need for editing for admissibility, accessibility, assessment of the promise to tell the truth, as well as when it will be played, and the implications for when the complainant will be required to be at court.<sup>39</sup>

### Recommendation 13

Compliance with section 44A of the Evidence Act 2006 (the notice requirement) shall be more consistently enforced (subject, as in the Pilot, to a specific inquiry as part of the case management process and drafting of a joint memorandum).

Admissibility decisions pursuant to section 44 should be decided and resolved pre-trial, except in exceptional and unforeseeable circumstances. This allows for well-prepared submissions and pre-trial appeals, as well as clarity for the complainant as to whether she will be asked questions about her sexual behaviour when giving evidence.<sup>40</sup>

### Recommendation 14

The policy that informed the enactment of section 44(2) (regarding the bar on reputation evidence) must be considered when judges are considering the admission of more than one piece of evidence about a complainant’s propensity in sexual matters.

The risk that the jury will draw inferences or be invited to draw inferences about the complainant’s reputation, although the evidence is not offered as being about her reputation in sexual matters, should be avoided.<sup>41</sup>

### Recommendation 15

Admissibility decisions pursuant to section 44 (and the proposed section 44AA, if enacted) shall be transcribed and kept on the case file.<sup>42</sup>

38 See Chapter Eight at [354](#) and at [383](#).

39 See Chapter Four at [113](#) and see also Crown Law Solicitor-General’s Guidelines for Prosecuting Sexual Violence (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [11.5].

40 See Chapter Five at [161](#).

41 See Chapter Five at [160](#).

42 See section 278.94(5) of the Criminal Code (Canada). See also Chapter Five at [197](#).

### Recommendation 16

Consideration is given to the provision of independent, suitably qualified and experienced counsel to assist with pre-trial admissibility decisions under section 44 (and the proposed section 44AA, if enacted) of the Evidence Act 2006.<sup>43</sup>

The need for such provision may be obviated by focussed training programmes for Crown counsel regarding the application of section 44.

### Recommendation 17

Consideration is given to introducing a “docket system” in sexual cases – that is, the same judge is responsible for case management from the pre-trial process until verdict and sentencing (if any).<sup>44</sup> Such a system should reduce the need for admissibility rulings during the trial, or reduce the time taken for any applications made at trial.

## Proposals relating to trial process

### Recommendation 18

The models of judicial communication with the complainant in a sexual case that are more common in the Sexual Violence Court Pilot, shall ideally be standard and unexceptional practice in all jury trials.

Such communication should include introductions and explanations of the process before the beginning of her evidence, information during the trial to assist orientation and understanding of order of events at trial, expressions of thanks or appreciation at the conclusion of her evidence and using her name. In particular, complainants must be told by the judge (as well as by the prosecutor pre-trial)<sup>45</sup> that they may ask for breaks and should say when they do not understand a question.<sup>46</sup>

43 See Chapter Five at 186 and see also section 278.94(3) of the Criminal Code (Canada); Clare McGlynn *Rape Trials and Sexual History Evidence* <https://claremcglynn.files.wordpress.com/2017/09/sexualhistoryevidence-briefing-mcglynn-august-2017.pdf>; Laura Hoyano “Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants” [2015] Criminal Law Review 107 at 124 ff.

44 See Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 24 and 34; Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims’ experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 88.

45 Crown Law Solicitor-General’s Guidelines for Prosecuting Sexual Violence (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [7.14.3].

46 See Chapter Four at 64.



**Recommendation 19**

Consideration is given to clarifying the permissible scope of interaction between the prosecutor and the complainant during the trial, such as the use of more personalised and supportive communication, expression of thanks or appreciation at the conclusion of her evidence and use of her name.<sup>47</sup> The Crown Prosecution Service of England and Wales provides a resource to help prosecutors manage the boundaries of their role in this regard.<sup>48</sup>

**Recommendation 20**

Work on improved court facilities for complainants (and all witnesses) shall include the addition of technology to enable amplification of a witness' voice (perhaps a collar microphone).<sup>49</sup>

We note that complainants are often reminded to “speak up”; however, it is the witness in the courtroom who is most unfamiliar with speaking in that environment and lacks both understanding of the importance of voice projection and the ability to do so while giving difficult evidence.

**Recommendation 21**

Section 88 of the Evidence Act 2006 (governing the admissibility of evidence of the complainant's occupation) must be consistently applied.

Prosecutors need to develop other introductory questions to settle the complainant and to object to the admission of information about the complainant that is not sufficiently relevant given the terms of section 88. Lack of attention to the admissibility of evidence governed by section 88 was similar in the Pilot cases and the cases in the principal study.<sup>50</sup>

47 See Chapter Four at [76](#) and Crown Law Solicitor-General's *Guidelines for Prosecuting Sexual Violence* (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [12.6].

48 <https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court>

49 See Chapter Four at [117](#).

50 See Chapter Six at [198](#).

### Recommendation 22

If a complainant asks for a break or is struggling with a line of questioning, judges shall respond – either by allowing a break or assisting the complainant to continue to give evidence by encouraging the use of pauses, taking a drink of water or the like.

This type of regular responsiveness, acknowledging the complainant's difficulties, was more common in the cases from the pilot study.<sup>51</sup>

### Recommendation 23

Evidence of the complainant's previous convictions shall only be admitted in accordance with the veracity rule (section 37 of the Evidence Act 2006).<sup>52</sup>

The only exception would be in cases where the complainant denied behaving in a way that was the factual basis for her previous conviction – and only when evidence of such behaviour is sufficiently relevant to the issues at trial.

### Recommendation 24

More consistent judicial control of questioning of complainants at trial is required. This could be achieved by targeted discussion or practical participatory exercises as part of an education and development programme for judges.

We noticed that while judges, especially in the Pilot, would intervene to ensure comprehension, to prevent counsel talking over the top of or interrupting the complainant, or to avoid repetition and prevent speculation, there was an absence of any control of questions we considered to be belittling, humiliating, mocking or unnecessarily pejorative.<sup>53</sup>

When interpreters were used to assist the complainant, judges were very proactive in requiring short, easily understood questions that did not deploy jargon, but this level of intervention was absent in other cases. Judges should also intervene more often to prevent extended questioning focussed on peripheral details or inconsistencies regarding such details.

51 See Chapter Four at [64](#).

52 See Chapter Six at [232](#).

53 See Chapter Eight at [370](#) and note Crown Law Solicitor-General's Guidelines for Prosecuting Sexual Violence (1 July 2019) [www.crownlaw.govt.nz/publications/prosecution-guidelines](http://www.crownlaw.govt.nz/publications/prosecution-guidelines) at [12.2].

**Recommendation 25**

Counsel should be more willing to intervene in questioning by the judge that is contrary to the scope of section 85 or amounts to unfair involvement in how the parties are presenting their case.<sup>54</sup>

**Recommendation 26**

Prosecutors should be more willing to pre-empt deployment of rape mythology by providing opportunities, in either examination-in-chief or re-examination, for the complainant to explain her choices.

For example, any failure to struggle or call out during the alleged sexual violence; her choice of person to complain to and when; time taken before reporting to the police; incremental disclosure; or any post-event communication or contact with the defendant.<sup>55</sup>

***Proposals related to the content and structure of closing arguments, summing-up and jury directions***

**Recommendation 27**

Prosecutors should pre-empt likely reinforcement of rape mythology by defence counsel by making submissions that problematise certain beliefs held about “real rape” and how real victims behave.

Prosecutors should also be more willing to request that the judge responds to aspects of the closing of defence counsel in their summing up to the jury.<sup>56</sup>

54 See Chapter Eight at [380](#). We are also of the view that Crown counsel should be willing to object to aspects of cross-examination, but note the attention to this matter in [12.2] of the *Solicitor-General’s Guidelines for Prosecuting Sexual Violence*.

55 For example, Chapter Seven at [220](#). In order to avoid adding to the length of further examination-in-chief where an EVI is played, thought be given to the specialist interviewers addressing such content during the investigative interview.

56 Our access to the case files did not allow us to determine how often this currently occurs.

**Recommendation 28**

Jurors should not be instructed to rely on their “common sense” when reaching a verdict.<sup>57</sup>

We consider a preferred option is to remind them that the strength of the jury system is the collective decision-making process, to which they bring their individual respective life experiences.

**Recommendations 29**

Jurors should be more consistently reminded that submissions and questions are not evidence.<sup>58</sup>

**Recommendation 30**

We consider that when jurors are told how to appropriately draw inferences from the facts it is more helpful to use an example from the particular case, as well as one in the abstract.<sup>59</sup>

**Recommendation 31**

Consideration is given to further provision of guidance to trial judges on the best structure of a summing-up. We suggest, to avoid repetition and reinforcement of counsel submissions, that the respective cases are only summarised during the discussion of the law, rather than with the provision of another summary at the end.<sup>60</sup>

Judges could also be clearer in their instructions about what the jury need not spend time on in terms of the evidence and submissions (including referencing any section 9 agreed statements of fact).

**Recommendation 32**

The content and timing of a direction under section 123 of the Evidence Act 2006 (advising the jury not to draw an inference adverse to the defendant because of the provision of support for the complainant) shall ideally be more consistent across jury trials.

<sup>57</sup> See Chapter Nine at [392](#).

<sup>58</sup> See Chapter Nine at [399](#).

<sup>59</sup> See Chapter Nine at [395](#).

<sup>60</sup> See Chapter Nine at [402](#).

We suggest that the direction includes reference to the closing of the court and the provision of a support person and any alternative way in which the complainant is giving evidence, and that the reasons for such assistance are also explained.<sup>61</sup> The direction should ideally be given before the complainant gives evidence and again during the summing-up. Additional content of directions related to the specific rules regarding cases involving sexual violence could well include a reminder that the complainant's identifying details are permanently suppressed.

### Recommendation 33

Judges, when directing the jury, shall respond to submissions which appear to rely on contestable beliefs about the behaviour of victims of sexual offending (in reliance of aspects of the proposed "counter-intuitive" directions), and also to unsubstantiated claims about the level of false complaints or the ease of making a complaint of rape.<sup>62</sup>

They should also respond to submissions that indicate the desirability of looking for supporting evidence by reminding the jury that they may convict on the uncorroborated evidence of the complainant.<sup>63</sup>

### Recommendation 34

Directions should be developed as to the limited use that can be made of sexual history evidence about the complainant.<sup>64</sup> Such directions should include reference to the purpose for which the evidence was admitted and that the evidence should not be used for any other purpose.

In the rare circumstances in which evidence of the complainant's sexual behaviour is admitted solely as relevant to an assessment of her credibility or veracity,<sup>65</sup> the jury should be directed to disregard the evidence when making a decision as to whether the defendant had reasonable grounds to believe that the complainant was consenting.

61 See Chapter Four at [109](#).

62 We suggest consideration is given to a mandatory adjournment between closing arguments and the summing-up to allow time for any further input from counsel as to the content of the summing-up.

63 See Chapter Nine at [428](#).

64 See Chapter Five at [192](#) (see in particular section 278.96 of the Criminal Code (Canada) and the National Judicial Institute (Canada) directions at [7.20]. See *Nolan v R* [2019] NZCA 298 at [26].

65 *Pegler v R* [2015] NZCA 260 at [24].

### Recommendation 35

More consistency and improved content is required regarding directions and questions trails on the elements of sections 128 and 128A.

We are of the view that, in particular, that it is an error to direct the jury that they should only find the defendant guilty (in the alternative) if “**no** reasonable person” would have thought the complainant was consenting.<sup>66</sup> We prefer the question trails and directions used in most of the Pilot cases in this regard.

We also consider that juries should be directed regarding the application of section 128A(3) as well as section 128A(4) when there is evidence the complainant was asleep due to the effects of intoxication at the relevant time.<sup>67</sup>

Juries should also be directed that there is no legal requirement for there to be evidence of the use of force or threats by the defendant, physical resistance or struggling by the complainant, injuries to the complainant or ejaculation by the defendant.

### Recommendation 36

The proposed “counter-intuitive” directions<sup>68</sup> should also include information on:

- (i) the extent to which people who are sexually assaulted are unable to, or do not, physically resist the attack, due to the physiological and psychological impacts of the event (fight, freeze or (be)friend);<sup>69</sup>
- (ii) the extent to which victims of sexual offending may (or may not) appear distressed after the alleged offending or when giving evidence, and that distress may manifest in varying ways, including in the form of anger or hostility;<sup>70</sup>
- (iii) the fact that in the majority of cases no genital injuries occur;<sup>71</sup>
- (iv) the fact that what victims were wearing at the time of the offending is not a contributor to sexual violence;<sup>72</sup>

<sup>66</sup> See Chapter Seven at [310](#).

<sup>67</sup> See Chapter Seven at [275](#).

<sup>68</sup> See clause 14 of the Sexual Violence Legislation Bill 2019.

<sup>69</sup> See Chapter Seven at [280](#) and Chapter Eight at [350](#).

<sup>70</sup> See Chapter Nine at [397](#) and at [468](#).

<sup>71</sup> See Chapter Seven at [293](#).

<sup>72</sup> See Chapter Seven at [286](#) and Chapter Nine at [433](#).

- (v) the fact that time of reporting and alleged rape, choice of whom to report to, or incremental reporting, are not indicators of a lack of truthfulness or reliability;<sup>73</sup>
- (vi) the forensic significance of post-event behaviour, such as contact with the defendant;<sup>74</sup> and
- (vii) the prevalence and nature of false reports of particular forms of sexual violence.<sup>75</sup>

Directions should also include reference to the need to avoid making assumptions about the nature of rape or other forms of sexual violence,<sup>76</sup> and the language used “should be simple and focus on the correct position rather than the myth to avoid reinforcing the erroneous beliefs”.<sup>77</sup>

### Recommendation 37

Counter-intuitive directions or related information shall be given to each juror in writing and/or by video or recorded directions.<sup>78</sup>

Directions should be given to the jury early in the trial, ideally during the opening remarks to the by the judge, and repeated, or referred to, at least once again in the summing-up.<sup>79</sup>

### Recommendation 38

Consideration is given to the development of directions on memory, including the impact of trauma and intoxication on a person’s ability to process and recall events, especially peripheral versus central details.<sup>80</sup>

73 See Chapter Six at [219](#) and Chapter Nine at [405](#).

74 See Chapter Six at [212](#) and Chapter Nine at [455](#).

75 See Chapter Eight at [343](#) and Chapter Nine at [423](#).

76 See Chapter Nine at [443](#).

77 New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.2].

78 *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1* (Department of Justice, 2019) at 29, Key Recommendation 4; James Chambers and Fiona Leverick *Methods of Conveying Information to Jurors: An Evidence Review* (Crime and Justice Social Research, Scottish Government, 2018) at 32.

79 See Chapter Nine at [475](#).

80 See Chapter Eight at [340](#).

### Recommendation 39

Consideration is given to the development of jury directions on how to assess lack of capacity to consent due to intoxication.<sup>81</sup>

Jury directions regarding the impact of intoxication on consent should refer to the content of section 128A(4) as well as to the requirement to focus on the complainant's ability to give consent at the relevant time, not just to the impact of intoxication on inhibitions. The focus of the inquiry should clearly remain on "what is essential for valid consent is that the complainant had an understanding of her situation and was capable of making up her own mind".<sup>82</sup>

### *Suggested evidential and procedural law reform*

### Recommendation 40

Section 44 (1) of the Evidence Act 2006 shall be amended to ensure it applies to evidence of:<sup>83</sup>

- (i) complainant's sexual orientation;
- (ii) the complainant being in an intimate relationship with someone else at the time of the alleged offending;
- (iii) the number of pregnancies or children the complainant has had;
- (iv) the complainant's use of or choices about contraception;
- (v) the complainant's possession or use of sex toys;
- (vi) the complainant's propensity or disposition in sexual matters (or "sexual behaviour") offered as relevant to the complainant's credibility;
- (vii) the complainant's sexual behaviour with another person or the defendant (including flirting, kissing or close dancing) even when proximate in time to the alleged offending;

<sup>81</sup> See Chapter Seven at [257](#).

<sup>82</sup> See Faye T Nitschke and others "Intoxicated But Not Incapacitated: Are There Effective Methods to Assist Juries in Interpreting Evidence of Voluntary Complainant Intoxication in Cases of Rape?" (2018) *Journal of Interpersonal Violence* doi: [10.1177/0886260518790601](#) at 9. In this research the authors noticed a difference in a juror's ability to use evidence of intoxication when an "inference support instruction" was given. "The text of the inference support instruction was: A person who voluntarily consumes alcohol may not have the capacity to consent to sexual penetration. A person's capacity to consent to sexual penetration may be impaired before they lose consciousness as a result of alcohol they have consumed. If a person does not have the capacity to consent to sexual penetration, they cannot give consent and consent cannot be present."

<sup>83</sup> See Chapter Five at [148](#).



- (viii) the complainant's having never previously behaved in a (relevant) sexual way; and,
- (ix) the complainant's sexual behaviour with the defendant (including the fact that they were in an intimate relationship at the time of the alleged offending), except that which is part of the events in issue.

#### Recommendation 41

Section 44 (or section 4) of the Evidence Act 2006 shall contain a definition of the term used to describe sexual behaviour or propensity in sexual matters (that is, the scope of section 44(1) including that in Recommendation 40).

Any sexual behaviour (including recorded fantasies or sexually charged messages or posts on social media) of a complainant involving the defendant should be defined as being within section 44(1), including the mere fact of a sexual relationship.

#### Recommendation 42

The Evidence Act 2006 is amended to include the equivalent of section 51(1)(b) of the Jury Directions Act 2015 (Vic), to the effect that the judge, prosecution or defendant must not say or suggest in any way that "complainants in sexual offence cases are an unreliable class of witness".

#### Recommendation 43

The Evidence Act 2006 is amended to the effect that the judge, prosecution or defendant must not say or suggest in any way that the complainant is responsible for the alleged offending, either during questioning or in closing arguments.<sup>84</sup>

#### Recommendation 44

Appellate court or legislative attention is given to the application of the veracity rules to the admissibility of alleged false statements made by a complainant about her sexual behaviour (including previous sexual offending against her), to ensure that the definition of veracity evidence is applied in a similar way in sexual cases as it is in other proceedings.<sup>85</sup>

<sup>84</sup> See also New Zealand Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) Recommendation 22.

<sup>85</sup> See Chapter Five at [168](#).

**Recommendation 45**

Legislative consideration should be given to the use and scope of “repetition warnings”.

In our view, repetition warnings should not be required as long as section 35(2)(a) is properly applied. If the previous consistent statement is sufficiently probative to respond to the challenge to the complainant’s veracity or accuracy, then the jury should be entrusted to give the evidence appropriate weight. If repetition warnings are retained, we recommend that they be used in a way to make it clear to juries that both lies, and the truth, may be the subject of repeated complaint or discussion.<sup>86</sup>

**Recommendation 46**

The Evidence Regulations 2007, or the Evidence Act 2006, should be amended to include a direction giving guidance to the jury as to assessing evidence of inconsistencies.<sup>87</sup>

**Recommendation 47**

Section 127 of the Evidence Act 2006 is repealed and counter-intuitive directions about the significance of the timing of the first complaint, including to whom the complainant reported and the evolving nature of the complaint, are developed.<sup>88</sup>

**Recommendation 48**

The reference to “occupation” in section 88 of the Evidence Act 2006 should be defined or extended to include:<sup>89</sup>

- (i) the occupation the complainant had at the time of the alleged offence and/or at the time of the trial;
- (ii) whether the complainant has (or had) no occupation or is (or was) unemployed or is (or was) a student, and in what course of study;
- (iii) whether the complainant is (or was) fully occupied caring for children or family members;
- (iv) the complainant’s school or tertiary qualifications.

86 See Chapter Nine at [412](#).

87 See Chapter Eight at [329](#).

88 See Chapter Six at [219](#) and Chapter Nine at [405](#).

89 See Chapter Six at [204](#).

*Proposed content of education and development programmes***Recommendation 49**

Education and development programmes for the judicial and counsel in cases involving allegations of sexual violence should include:

- (i) guidance and good practice examples on courteous communication with complainants and the obligations under the Victim's Rights Act 2002;<sup>90</sup>
- (ii) discussion of the constraints (if any) that ethical obligations do (or should) place on the deployment of rape mythology, especially during closing arguments;<sup>91</sup>
- (iii) modelling of cross-examination techniques that reduce reliance on repetition, un-flagged changes of topic, confusing, time-pressured, or complex and compound questions and memory-testing questions concerning minute levels of detail about peripheral matters – as well as discussion of the scope of legitimate questioning required to meet the section 92 duty;<sup>92</sup>
- (iv) best practice and trauma-informed methods for communicating with and assisting complainants of sexual violence while they are giving evidence, extending the innovative practices being used in the Pilot;<sup>93</sup>
- (v) the need to inquire into whether the complainant consents to the presence of observers while she is giving evidence;<sup>94</sup>
- (vi) an education module aiding familiarity with social media and the variety of platforms and technologies it uses so as to reduce the difficulties that lack of understanding of digital technology is causing for complainants in the courtroom;<sup>95</sup>
- (vii) information about social interactions, dating norms and intimacy expectations of people aged 16–26, including their use of social media;<sup>96</sup>
- (viii) information about the likely impact of varying levels of intoxication on behaviour and memory;<sup>97</sup>

90 See Chapter Four at [81](#).

91 See Chapter Nine at [475](#).

92 See Chapter Eight at [325](#); Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 75.

93 See Chapter Four at [64](#).

94 See Chapter Four at [116](#).

95 See Chapter Four at [84](#).

96 See Chapter Four at [84](#), Chapter Five at [181](#) and Chapter Seven at [299](#).

97 See Chapter Seven at [255](#) and at [257](#).

- (ix) education on the substantive law of rape and the relationship between gender stereotypes and the legal process in the context of sexual cases;<sup>98</sup>
- (x) content about the social context of sexual violence, including: the gendered nature of sexual violence; the connection between common myths and stereotypes about rape and victim blaming; and practical content that encourages judges to recognise and reflect upon their own stereotypical assumptions about gender, sexuality and sexual violence (and the impact of those assumptions on their decision-making and trial practice);
- (xi) training in cross-cultural communication, plain language questioning and the avoidance of asking questions that reinforce rape mythology;<sup>99</sup>
- (xii) consideration of what amounts to a good faith basis for a question. While it has historically been the case that a “cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition”,<sup>100</sup> we see value in discussing the meaning of what are generally agreed to be reasonable inferences in contemporary society (including what amounts to “reasonable instructions”: see rule 13.10.2 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008).<sup>101</sup>

### Recommendation 50

Education and development programmes must be Government funded, overseen by the Institute of Judicial Studies, well prepared and well organised, with delivery by experienced and qualified presenters. The programmes should run over a minimum of two days.

Judges and counsel involved in criminal trials involving allegations of sexual violence<sup>102</sup> must complete the programme at a minimum of every three years. Consideration should be given to whether a similar model to training to become a Youth Advocate should apply in this context – certainly there should be an expectation that counsel shall provide evidence of competency to undertake trials involving allegations of sexual violence.

98 See Chapter Four at [84](#), Chapter Five at [181](#) and Chapter Seven at [299](#).

99 See Chapter Four at [95](#).

100 *Lyttle v R* (2004) 235 DLR (4th) 244 (SCC) at [48].

101 See Chapter Eight at [325](#); Nicola Manning “A defence lawyer at the Criminal Justice Summit” (2018) 922 LawTalk 62 at 63.

102 We also consider counsel and judges involved in any proceedings involving allegations of sexual violence (including employment and family law) must attend such programmes.

### Recommendation 51

The training programmes for those professionals who assist complainants through the pre-trial and trial processes should include representation or input from those who defend or prosecute sexual cases to ensure that complainants are given accurate and current advice about their role, and the role of a support person.

For example, there is no “no touch rule” for support people,<sup>103</sup> but there are limits to physical contact based on the risk of adverse inferences and the layout constraints of the courtroom; complainants should be advised they can wait and think before answering questions or say if they do not understand a question and can ask to refresh their memory from a pre-trial statement; and, that it is permissible for complainants to show emotion (and to ask for breaks), but impermissible to be obstructive or unfairly criticise defence counsel.

### Substantive law reform

### Recommendation 52

The *actus reus* aspect of section 128 of the Crimes Act 1961 (lack of complainant consent) requires legislative attention.

We suggest that as part of the Government’s proposed long-term work plan, if not earlier, the desirability of the codification of the definition of consent (including a requirement of an “affirmative communicative model”) is considered, as well as whether the requirement of lack of consent could be replaced with another inquiry.<sup>104</sup>

### Recommendation 53

Legislative reform is required to provide guidance on what might amount to the “something more” than a lack of protest or physical resistance (section 128A(1) of the Crimes Act 1961) in order for this to amount to consent, or to provide reasonable grounds for a belief in consent.<sup>105</sup>

103 Contra <https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/6dhd38-Criminal-Justice-Victims-workshop-playback-report.pdf> at 18 and 34.

104 See for example Lise Gotell “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v J.A.*” (2012) 24 Canadian Journal of Women and the Law 359; Joanne Conaghan “The Essence of Rape” (2019) 39 Oxford Journal of Legal Studies 151.

105 See Chapter Seven at 277.

#### Recommendation 54

Legislative guidance is required regarding the impact of the matters listed in sections 128A(1)–(7) of the Crimes Act 1961 on the *mens rea* requirement in section 128.<sup>106</sup>

Clarification is needed concerning the circumstances under which the fact that a defendant is aware of the existence of any of the matters listed should preclude an argument that the defendant believed on reasonable grounds that the complainant was consenting.

#### Recommendation 55

Consideration, including public consultation on the matter, given the level of debate,<sup>107</sup> should be given as to whether legislative guidance or jury directions should contain examples of what should or should not amount to reasonable grounds, or “relevant community expectations”.

<sup>106</sup> See Chapter Seven at 314.

<sup>107</sup> <https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/6dhd38-Criminal-Justice-Victims-workshop-playback-report.pdf> at 35.

## APPENDICES

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## APPENDIX ONE

## SUMMARIES OF THE CASES IN THE PRINCIPAL AND PILOT STUDIES

All names are pseudonyms. Defendants' pseudonyms (as the case name) are listed in alphabetical order. Facts have been altered or omitted to comply with suppression orders and the complainants' privacy and confidentiality rights. For example, if the events took place at a well-known location, the name has been changed to a generic identifier such as "public venue". Dates and ages given relate to the trial rather than to the time of the alleged rape.

## PRINCIPAL STUDY (Cases = 30)

***R v Ahmed*** (2013) – Leilani Anae (36) and Masood Ahmed were distant relatives. They were at a social gathering with family, after which Masood offered Leilani a ride home. Instead, Masood drove to his house and invited Leilani in. Leilani gave evidence that Masood then prevented her from leaving and raped her. Masood's evidence at trial was that they had engaged in consensual sex, Leilani claiming she was raped only after he expressed disinterest in an ongoing relationship. Masood Ahmed was acquitted of rape, unlawful sexual connection and attempted sexual violation.

***R v Buchner*** (2014) – Farida Nasser (21) and Anthony Buchner were friends and had a social group in common. One evening, when they were socialising with the group, Farida became upset after receiving some bad news. Anthony accompanied her home and by agreement stayed the night. Farida's evidence was that Anthony had sex with her that night despite her protests. At trial, Anthony gave evidence that they engaged in consensual sexual activity. He said Farida invented the rape claim to receive attention from a man to whom she was attracted. Anthony Buchner was acquitted of rape, unlawful sexual connection and indecent assault.

***R v Carter*** (2012) – Theresa Bush (28) and Zachery Carter met through an internet dating website and had been out together on a couple of occasions. Theresa said that during a date Zachery suggested sexual intercourse, which she declined, but she did agree to some sexual activity other than intercourse. She alleged that, despite her protests, Zachery forcibly penetrated her. Zachery did not give evidence at his trial, but he made a statement to the police. The defence case was that Theresa had consented to sex that she later regretted, and that Zachery thought her protests were part of the fun of the interchange. Zachery Carter was acquitted of rape and unlawful sexual connection.



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***R v Depak*** (2013) – Rachel Cowan (18) and a friend were out socialising on a Friday night. At the end of the evening, they returned to the friend’s home, where Rachel went to sleep in the spare bedroom. Rachel gave evidence that during the night her friend’s boyfriend, Reji Depak, got into bed with her and raped her. She said she was frightened of him and had no way of leaving the house. Reji made a statement to the police but did not give evidence at the trial. The defence case was that Rachel had invented the rape claim rather than have people know she had consensual sex with her friend’s boyfriend. Reji Depak was convicted of rape but acquitted of unlawful sexual connection and was sentenced to seven years imprisonment. He unsuccessfully appealed his conviction on the grounds that his trial counsel had failed to cross-examine the complainant about an alleged retraction.

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***R v Devi*** (2011) – Kaia Henare (18) and Ajay Devi worked together. Kaia alleged that Ajay cornered her at work one afternoon and raped her. She gave evidence that she was unfamiliar with sexual matters and did not know how to stop him. Ajay’s evidence at trial was that Kaia had been asking him about sex, that she initiated sexual contact and the sex they had was consensual. The defence case was that Kaia invented the rape claim because of shame and pressure from her family. Ajay Devi was convicted of rape and unlawful sexual connection. Ajay successfully appealed his conviction on the ground of counsel incompetence and a retrial was ordered. The Crown did not offer any evidence and Ajay Devi was discharged.

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***R v Edwards*** (2014) – Anahera Matiu (19) was socialising with a group of friends at the home of Matthew Edwards one evening. She became intoxicated and went to sleep in the spare room. She alleged that Matthew came into the room and raped her. A witness gave evidence of overhearing Anahera telling Matthew to stop and get off her. Matthew did not give evidence, nor did he speak to the police. His defence at trial was that they had had consensual sex and that Anahera’s false complaint was an attempt to conceal that from someone to whom she was attracted. Matthew Edwards was convicted of rape and unlawful sexual connection and sentenced to eight years and six months imprisonment. He unsuccessfully appealed his conviction on the grounds that evidence of a prior complaint of sexual assault by Anahera should have been admitted.

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***R v Elliot*** (2014) – Janey Milne (25) met Cameron Elliot at a friend’s place. Over time they established a mutual attraction and eventually had consensual sex. The following day Janey told Cameron, that while she liked him, she did not want any further sexual contact with him. Cameron stayed the night at Janey’s house that evening. Her evidence was that she awoke to him raping her. Cameron gave evidence at the trial that they had had consensual sex at Janey’s initiation. He claimed Janey made a false allegation of rape in order to conceal their affair from her partner who was away at the time. Cameron Elliot was acquitted of rape.

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***R v Gamage*** (2013) – Kelly Taylor (18) secured part-time work in Ravindu Gamage’s business. Kelly said that from the outset Ravindu was very demonstrative, but that she went along with his affections so as not to offend him and to keep the job. Her evidence was that Ravindu cornered her at work and forced her to have sex with him. Ravindu gave evidence at the trial, and alleged he paid Kelly for consensual sex, which she now regretted. Ravindu Gamage was convicted of rape, unlawful sexual connection and indecent assault. He was sentenced to seven years and nine months imprisonment.

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***R v Harete*** (2014) – Hazel McKay (age unknown) and Hone Harete were strangers. Hazel had been socialising with friends during the day and was very intoxicated. She decided to walk home and encountered Hone. Hazel’s evidence was that she could not remember all the events that followed, but she did recall having semen in her underpants as she walked away from him. Her evidence was that she was too drunk to consent to sex and would not have done so anyway. Hone did not give evidence at his trial, but did speak to the police. The defence case was that Hazel initiated consensual sexual contact but was unable to remember doing so. Hone Harete was acquitted of rape.

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***R v Harris*** (2011) – Megan Boyd (age unknown) and Jayden Harris initially met online, meeting in person on the day in question. That evening they had consensual sex but then had a disagreement. Megan alleged that she asked Jayden to leave her home, but that he did not and then raped her. Jayden did not give evidence at his trial. The defence case was that they had consensual sex and that Megan invented the rape claim due to her shame at having had anal sex with a casual lover. Jayden Harris was convicted of rape and unlawful sexual connection and sentenced to seven years imprisonment. His appeal on the grounds of trial counsel incompetence was unsuccessful.

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***R v Ihaka*** (2013) – Paora Ihaka was charged with sexual offences against Rebekah Pantoja (47) and her adult daughter. Paora was a friend of the family and came to their house regularly over a period of years. Rebekah Pantoja gave evidence that Paora had sex with her against her will on a number of these occasions. Paora did not give evidence at the trial. The defence case was that he had consensual sex with both women and that Rebekah falsely claimed rape to support her daughter’s allegations, which were the result of transference. Paora Ihaka was convicted of the rape and indecent assault of Rebekah and sentenced to 10 years imprisonment. He unsuccessfully appealed his convictions on the grounds of prosecutorial misconduct.

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***R v Jackson*** (2011) – Yasmin Paulin (18) was socialising with a group of people at a friend’s house. She became very intoxicated and was put to bed in the same bed that Richard Jackson was already in. They did not know each other. Yasmin gave evidence that she awoke to Richard raping her. Richard’s evidence was that Yasmin had initiated the sexual activity and he believed it was consensual. The defence case was that in her intoxicated state, Yasmin

had mistakenly thought Richard was her boyfriend. Richard Jackson was acquitted of rape but convicted of unlawful sexual connection and sentenced to five years imprisonment. He unsuccessfully appealed the conviction on the grounds of jury misdirection, prosecutorial misconduct and inconsistent verdicts.

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***R v Jacobs*** (2013) – Sara Fuimoana (18) applied for a job working for Caleb Jacobs. Sara alleged that on the second day of work he detained her and raped her throughout the night and the next day, until they were detected by a member of the public who called the police. Caleb gave evidence that they had consensual sex once during the evening, saying Sara’s allegations were an attempt to hide their affair from her boyfriend. At the trial, evidence of Caleb’s previous convictions for similar offending against two women was admitted. Caleb Jacobs was found guilty of rape, unlawful sexual connection, male assaults female and abduction. He was acquitted of threatening to kill. Jacobs was sentenced to preventative detention with a minimum period of imprisonment of nine years and four months. He appealed his conviction on the grounds of jury misdirection, trial counsel error and inconsistent verdicts. That appeal and his appeal against sentence were dismissed.

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***R v Kingsford*** (2014) – Deborah Smits (21) had recently begun work in the commercial sex industry. She gave evidence that Patrick Kingsford engaged her services but then beat and raped her. A second complainant alleged similar offending around the same time. Patrick’s evidence was that Deborah had agreed to the sexual contact and claimed that the two complainants had colluded against him because they owed him money for drugs. Patrick Kingsford was acquitted of rape, unlawful sexual connection, kidnapping and assault with a weapon. He was convicted of male assaults female and sentenced to 10 months imprisonment.

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***R v Langley*** (2013) – Mei Zhang (22) and her husband were house-sharing with two other people, including the defendant, Steven Langley. Mei alleged that Steven raped her and said that she was unable to stop him because of the position of power he had over her and her husband’s employment. Steven’s evidence at trial was that Mei made a false allegation to hide their affair from her husband and to bolster a claim of sexual harassment against their mutual employer. Steven Langley was convicted of rape and sentenced to five years and six months imprisonment.

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***R v Masters*** (2014) – Nadine Gregory (23) and Darryl Masters had recently met. Nadine gave evidence that Darryl stayed the night at her house after they socialised together one evening and that she awoke to him raping her. Nadine said she did not want a sexual relationship with Darryl and had repelled his previous advances. At trial, Darryl gave evidence that he and Nadine were in a developing sexual relationship and that he believed the sex was consensual. In his view, Nadine claimed she was raped to hide their affair from another man she was interested in. Darryl Masters was acquitted of rape but convicted of indecent assault (on a separate occasion) and was sentenced to community service.

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**R v Moss** (2010) – Vivienne Donald (25) and Bevan Moss were neighbours. One evening Vivienne attended a party at Bevan’s house. Vivienne gave evidence that she was intoxicated when she left the party and, in the early hours of the morning, Bevan forced his way into her house and raped her. When giving evidence, Bevan claimed that Vivienne had suggested a sexual relationship between them and they had consensual sex, which she then regretted. Bevan Moss was convicted of rape and sentenced to 11 years and 10 months imprisonment. He appealed his conviction on the grounds that fresh evidence was available but the appeal was dismissed.

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**R v Nash** (2014) – Holly Noakes (22) and Alton Nash had been on a number of dates. Holly said that she had recently told Alton that she did not wish to have a romantic relationship with him, but was happy to remain friends. Shortly after that, Alton attended a party at her house. Holly gave evidence that, during the party, Alton isolated her and raped her. Alton did not give evidence, but the defence case was that he had engaged in consensual sexual activity with Holly. Alton Nash was acquitted of rape and unlawful sexual connection.

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**R v Patel** (2013) – Lily Kowhai (22) was socialising with friends at an entertainment precinct one evening, but became separated from them. While trying to locate her friends, she encountered Dinesh Patel who offered to help her find them. Lily gave evidence that while escorting her through some side streets, Dinesh raped her. Dinesh’s evidence was that their sexual intercourse was consensual. The defence case was that Lily claimed she was raped because Dinesh had not wanted ongoing contact with her. Dinesh Patel was convicted of rape and sentenced to nine years imprisonment. He unsuccessfully appealed his sentence.

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**R v Perez** (2015) – Mary DeSouza (34) and Fernando Perez made contact through a dating website. They arranged to meet for the first time, which Mary expected to be in a nearby restaurant. Instead, Fernando drove them to his home some distance away. Her evidence was that he then raped her, despite her protests. Fernando did not give evidence at his trial, but the defence case was that they had consensual sex at Mary’s initiation, which she wanted to conceal from another man she was interested in dating. Fernando Perez was acquitted of rape and unlawful sexual connection.

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**R v Roberts** (2011) – Lara Snow (51) and Callum Roberts were mutually acquainted through Lara’s ex-husband. According to Lara, while visiting her one night, Callum gave her an overdose of her medication and, once she was stupefied, raped her. Lara gave evidence that she could not recall the events of the evening but that her physical condition the next day led her to seek medical attention. There was evidence of the drug in her blood and of sexual intercourse. In his evidence, Callum said that Lara had voluntarily taken her own medication and they had both consumed drugs and alcohol and had consensual sex. The defence case was that Lara’s false accusation was an attempt to hide their ongoing affair (which Lara denied existed) from her ex-husband. Callum Roberts was acquitted of rape and stupefaction.

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**R v Schuette** (2011) – Ianthe Craig (28) and Crispin Schuette had recently met through mutual friends. One night Crispin went to Ianthe's home to socialise with her and her flatmates. At the end of the evening Ianthe went to bed heavily intoxicated. Her evidence was that she awoke to Crispin raping her. In giving evidence at trial, Crispin said that he and Ianthe had sex at her initiation, but she was too intoxicated to recall initiating the consensual sex. Crispin Schuette was acquitted of rape and unlawful sexual connection.

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**R v Simon** (2014) – Parvin Azarmandi (age unknown) celebrated a personal achievement by drinking wine, and became intoxicated. While waiting for transport home, she encountered Haris Simon. Her evidence was that he took her to a public toilet and raped her. At trial, Haris gave evidence that their sexual encounter was consensual. The defence case was that Parvin was so intoxicated that she could not recall that she initiated and consented to the sexual activity. Haris Simon was acquitted of rape.

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**R v Smythe** (2012) – Dani Kavka (21) and Alexander Smythe were fellow employees. One evening they socialised together with workmates and both became intoxicated. Dani gave evidence that at the end of evening she went home but Alexander followed her, coerced her into letting him in and then raped her. In his evidence, Alexander said that they had consensual sex. The defence case was that Dani's false allegation was motivated by a desire to conceal their sexual relations from her romantic partner. Alexander Smythe was acquitted of rape.

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**R v Tait** (2014) – One evening Zoë Phillips (20) and Jesse Tait were socialising with a mutual friend at a bar. Zoë agreed to Jesse staying the night at her house because he had nowhere to sleep. Zoë was intoxicated and said she recalled making up the couch for Jesse and later waking during the night to vomit. Her evidence was that in the morning she awoke to discover that she was naked from the waist down. The semen found on her contained Jesse's DNA. At trial, Jesse gave evidence that he and Zoë had consensual sex, but that Zoë had been too intoxicated to recall initiating and participating in the sexual intercourse. Jesse Tait was acquitted of rape.

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**R v Vandenberg** (2010) – Zara Wilkes (25) met Alain Vandenberg at a bar one evening when she was socialising with friends. During the course of the evening Zara became intoxicated and her memory of the night is patchy. However, in her evidence she claimed to clearly recall protesting while Alain raped her in a nearby carpark. Alain did not give evidence, nor did he make a statement to the police. The defence case was that the sexual encounter was consensual and that Zara claimed she was raped because she was ashamed of having casual sex. Alain Vandenberg was convicted of rape and sentenced to five years and nine months imprisonment. He unsuccessfully appealed his conviction on the grounds that the judge misdirected the jury.

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***R v Walters*** (2014) – Chantal Tiaiti (17) and Heath Walters had known each other through engaging in a mutual leisure interest for several years. Chantal was invited to Heath's home to socialise. Chantal alleged that Heath made unwelcome sexual advances, which she rebuffed, but he ignored her and raped her. Heath did not give evidence at trial, but the defence case was that he and Chantal had consensual sex, which she initiated but later regretted. Heath Walters was acquitted of rape and attempted sexual violation.

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***R v Wilde*** (2015) – Alice McCann (27) was backpacking around New Zealand when she met Ben Wilde on a tour. After socialising together with others one evening, Alice went to bed in shared accommodation. She gave evidence that she awoke to Ben raping her. Ben's evidence at the trial was that he engaged in consensual caressing with Alice but that they did not have intercourse. Ben Wilde was convicted of rape and unlawful sexual connection and sentenced to four years and two months imprisonment. His appeal on the grounds of trial counsel error was unsuccessful.

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***R v Yamada*** (2013) – Grace Sik (23) and Rangi Yamada were work colleagues and one evening both attended a social function at another colleague's house. Grace became very intoxicated and was put to bed in the spare bedroom. She gave evidence that she was too intoxicated to recall much of the evening, other than waking to Rangi raping her. In his evidence, Rangi said that he thought Grace was consenting and that Grace falsely alleged rape to conceal the sex from her partner. Rangi Yamada was acquitted of rape.

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***R v Young*** (2014) – Erin Blackman (23) and Oscar Young knew each other through mutual friends. They were at a party at a friend's house. Erin's friend who had agreed to drive her home became intoxicated, so Oscar offered to drive Erin home. Erin alleged that during that trip Oscar drove her to a secluded area and raped her. Giving evidence at trial, Oscar claimed they had consensual sex and Erin accused him of rape in order to hide an affair she was having from her partner. The jury at this trial was unable to reach a verdict.

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#### PILOT STUDY (Cases = 10)

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***R v Cropp*** (2018) – Paige Downley (40) was a close friend of the wife of Jeremy Cropp, and the three had socialised together on a number of occasions. One evening, Paige was at their house and became very intoxicated. She went home, taking medication to help her sleep. Her evidence was that she awoke to find Jeremy in her bed and discovered they had had sex. She said she could not have consented as she was heavily sedated. Jeremy gave evidence that he and Paige had previously had consensual sexual contact and he went to her house that night and let himself in at her invitation. The defence case was that following his wife learning of the affair, Paige lied about being raped to avoid admitting to having an affair with her best friend's husband. Jeremy Cropp was acquitted of rape and burglary.

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***R v Junn*** (2018) – Charnze Vete (23) attended a corporate social event with a group of acquaintances, where she met Kevin Junn, who was the host of the event. After that event, she went with Kevin and a small group to another venue. Charnze said that she was very intoxicated and was unable to remember much of the time she spent at the venue. She gave evidence that she was too intoxicated to consent to sex. Kevin’s evidence at trial was that Charnze appeared to be conscious during the sexual activity and that he believed she consented. Kevin Junn was convicted of rape and sentenced to five years and two months imprisonment. He successfully appealed his conviction on the ground that unfairly prejudicial evidence was admitted at the trial and a retrial was ordered.

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***R v Kata*** (2018) – Louisa Saunders (30) and Gregory Kata met at a wedding. After the celebrations, Louisa went to bed. She said she was intoxicated and recalled getting into the bed, which she was sharing with a female friend, but was then awoken by Gregory raping her. In her evidence, Louisa said she had minimal contact with Gregory during the wedding and was not attracted to him. Gregory gave evidence that Louisa had flirted with him throughout the evening and had invited him to her bedroom and engaged in consensual sex. Gregory Kata was acquitted of rape and unlawful sexual connection.

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***R v Lino*** (2018) – Terri Hodson (18) and Mason Lino attended the same high school and had been social media friends for several years. One evening they were socialising together at a mutual friend’s home and Terri became intoxicated. She said that she recalled going to bed in the lounge next to her mutual friend. Her evidence was that she awoke in the night to Mason raping her. She said she would not have consented to sex with him. Mason did not give evidence, but the defence case was that he and Terri had had consensual sex at her initiation, and she falsely claimed she was raped to avoid having to admit that to her boyfriend and family. Mason Lino was acquitted of rape, unlawful sexual connection and indecent assault.

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***R v Lowrie*** (2018) – Jihee Tucker (18) and Travis Lowrie attended a party. They did not know each other and did not communicate at the party. Jihee became intoxicated and was put to bed in one of the bedrooms. Her evidence was that she awoke to Travis raping her. She said she was barely conscious during the sexual activity and could not function adequately to prevent it. Travis gave evidence that he had been encouraged by Jihee to have sex with her and he believed she was consenting. The defence case was that Jihee fabricated the allegations due to family pressure after they found out about the sexual activity. Travis Lowrie was acquitted of rape and unlawful sexual connection.

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***R v Redman*** (2018) – Molly Rose (24) met Tana Redman when attending an entertainment event with friends. He was invited by one of her flatmates to return to their flat for a party afterwards. Molly gave evidence that she went to bed heavily intoxicated that evening and awoke to Tana raping her. Tana did not give evidence at trial. The defence case was that Molly had flirted with him throughout the evening and she was a willing participant in their consensual sexual activity. Tana Redman was acquitted of one charge of rape.

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***R v Salah*** (2018) – Maria Sephton (21) and Eugene Salah attended the party of a mutual acquaintance. Maria became intoxicated and went to sleep in one of the rooms at the party. She gave evidence that she awoke to being raped, but that she was too intoxicated to identify the man or to stop him from having intercourse with her. Eugene Salah was identified by DNA evidence. His evidence at trial was that the sex was consensual but Maria was too intoxicated to recall her willing participation. Eugene Salah was convicted of rape and sentenced to seven years and eight months imprisonment.

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***R v Sarkisian*** (2018) – Katrina Gibson (26) and Jordayne Sarkisian had mutual friends and were both at a celebration with them. Katrina's evidence was that she did not recall going to bed due to being very intoxicated, but was awoken by Jordayne having sex with her. Katrina said she would not have consented to having sex with Jordayne and was too intoxicated to do so. Jordayne gave evidence at trial that Katrina invited him to have sex with her and that it was consensual. Jordayne Sarkisian was acquitted of rape.

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***R v Satae*** (2017) – Annamaria Casey (21) and Ligi Satae did not know each other until they met at an entertainment precinct. At the end of the evening, Ligi offered to escort Annamaria and her friend to her friend's house where they were staying the night. Once there, he asked to stay as he had nowhere else to go, and he was allowed to sleep in the lounge. Annamarie gave evidence that she was awoken by Ligi raping her. Ligi's evidence at trial was that he and Annamarie had engaged in consensual sex, which she had initiated but now regretted. Ligi Satae was acquitted of rape.

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***R v Waititi*** (2018) – Livi Fan (33) and Iain Waititi were neighbours, but had minimal social contact. One evening Livi and her flatmates held a party at their house that Iain attended with some friends. Livi became intoxicated and went to bed. She gave evidence that she awoke to Iain raping her. Iain did not give evidence at trial, nor did he make a statement to the police. The defence case was that Livi had flirted with Iain throughout the evening and consensual sex occurred while she was conscious. Iain was convicted of rape but acquitted of unlawful sexual connection. He was sentenced to six years and nine months imprisonment.

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## APPENDIX TWO

## RELEVANT LEGISLATION

## CRIMES ACT 1961

## 2 Interpretation

- (1) In this Act, unless the context otherwise requires,—

**assault** means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and to assault has a corresponding meaning

**genitalia** includes a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)

**penis** includes a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex)

**sexual connection** means—

- (a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of—
  - (i) a part of the body of another person; or
  - (ii) an object held or manipulated by another person; or
- (b) connection between the mouth or tongue of one person and a part of another person's genitalia or anus; or
- (c) the continuation of connection of a kind described in paragraph (a) or paragraph (b)

## 128 Sexual violation defined

- (1) Sexual violation is the act of a person who—
  - (a) rapes another person; or
  - (b) has unlawful sexual connection with another person.
- (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
  - (a) without person B's consent to the connection; and
  - (b) without believing on reasonable grounds that person B consents to the connection.

- (3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—
  - (a) without person B's consent to the connection; and
  - (b) without believing on reasonable grounds that person B consents to the connection.
- (4) One person may be convicted of the sexual violation of another person at a time when they were married to each other.

#### 128A Allowing sexual activity does not amount to consent in some circumstances

- (1) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.
- (2) A person does not consent to sexual activity if he or she allows the activity because of—
  - (a) force applied to him or her or some other person; or
  - (b) the threat (express or implied) of the application of force to him or her or some other person; or
  - (c) the fear of the application of force to him or her or some other person.
- (3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
- (4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.
- (5) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.
- (6) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.
- (7) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.
- (8) This section does not limit the circumstances in which a person does not consent to sexual activity.
- (9) For the purposes of this section,—
 

**allows** includes acquiesces in, submits to, participates in, and undertakes **sexual activity**, in relation to a person, means—

  - (a) sexual connection with the person; or
  - (b) the doing on the person of an indecent act that, without the person's consent, would be an indecent assault of the person.

**134 Sexual conduct with young person under 16**

- (1) Every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.
- (2) Every one who attempts to have sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.
- (3) Every one who does an indecent act on a young person is liable to imprisonment for a term not exceeding 7 years.
- (4) No person can be convicted of a charge under this section if he or she was married to the young person concerned at the time of the sexual connection or indecent act concerned.
- (5) The young person in respect of whom an offence against this section was committed cannot be charged as a party to the offence if the person who committed the offence was of or over the age of 16 years when the offence was committed.
- (6) In this section,—
  - (a) **young person** means a person under the age of 16 years; and
  - (b) doing an indecent act on a young person includes indecently assaulting the young person.

**134A Defence to charge under section 134**

- (1) It is a defence to a charge under section 134 if the person charged proves that,—
  - (a) before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and
  - (b) at the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and
  - (c) the young person consented.
- (2) Except to the extent provided in subsection (1),—
  - (a) it is not a defence to a charge under section 134 that the young person concerned consented; and
  - (b) it is not a defence to a charge under section 134 that the person charged believed that the young person concerned was of or over the age of 16 years.

**135 Indecent assault**

Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person.

## CRIMINAL PROCEDURE ACT 2011

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### 54 Adjournment for case review

- (1) If the defendant pleads not guilty to a charge for a category 2, 3, or 4 offence, a judicial officer must adjourn the proceeding for case review.
- (2) A Registrar may exercise the power under subsection (1) to adjourn a proceeding for a category 2 or 3 offence.

### 55 Case management discussions and case management memorandum

- (1) If the defendant is represented by a lawyer, before the date to which the proceeding is adjourned for case review the prosecutor and defendant must—
  - (a) engage in case management discussions to ascertain whether the proceeding will proceed to trial and, if so, make any arrangements necessary for its fair and expeditious resolution; and
  - (b) jointly complete a memorandum containing the information specified in section 56 (the **case management memorandum**).
- (2) If, in accordance with section 138(1)(a), 2 or more charges are to be heard together, a single case management memorandum may be filed in respect of all the charges to be heard together.
- (3) The case management memorandum must be filed by the defendant by the time prescribed in rules of court.

### 56 Information to be provided in case management memorandum

- (1) A case management memorandum must contain the following information:
  - (a) whether the defendant intends to change his or her plea:
  - (b) whether the prosecutor intends to seek leave to amend or withdraw any charges:
  - (c) whether the prosecutor proposes to add a new charge or charges against the defendant:
  - (ca) whether any charges are to be heard together under section 138(1) (including together with charges heard against 1 or more other defendants):
  - (d) whether the defendant requests a sentence indication under section 61:
  - (e) whether the prosecutor or the defendant, or both, consider there is a matter (other than one in paragraph (a), (b), or (d)) that requires judicial intervention and, if so, the nature of that matter:
  - (f) if the offence is a category 2 or 3 offence, whether the prosecutor considers that it is a protocol offence and,—
    - (i) if so, the views of the prosecutor and the defendant as to the appropriate court in which the proceeding should be tried; or
    - (ii) if not, whether the prosecutor or the defendant intends to apply for a transfer of the proceeding under section 70:
  - (g) any other information required by rules of court.

- (2) If the trial procedure is the Judge-alone trial procedure, a case management memorandum must also contain the following information:
  - (a) notice of any pre-trial applications (other than those referred to in subsection (1)) that the prosecutor or the defendant, or both, intend to make;
  - (b) any admissions that the defendant makes under section 9 of the Evidence Act 2006;
  - (c) any indication the defendant wishes to give of—
    - (i) any fact (not being a fact to which paragraph (b) refers) that the defendant will, or will not, dispute at the trial; and
    - (ii) any issue that the defendant will, or will not, dispute at the trial or on which the defendant intends to rely at the trial;
  - (d) the number of witnesses proposed to be called, the estimated duration of the trial, and any other information in relation to the management of the trial that is required by rules of court;
  - (e) any other information required by rules of court.

## 57 Case review

- (1) At the case review hearing, the court must deal with any matter in section 56(1) (a) to (e) that has been identified in the case management memorandum.
- (2) If the defendant is unrepresented, the parties must, as appropriate,—
  - (a) inform the court of the matters specified in section 56(1); and
  - (b) if the matter is to proceed to a Judge-alone trial, inform the court of the matters referred to in section 56(2).
- (3) At the case review hearing the court may,—
  - (a) in the case of a proceeding for which there will be a Judge-alone trial, adjourn the proceedings for trial; and
  - (b) in the case of a proceeding for which there will be a jury trial, adjourn the proceedings for trial callover.
- (4) A Registrar must exercise the power of the court under this section if—
  - (a) the defendant is represented; and
  - (b) a case management memorandum has been filed; and
  - (c) according to the case management memorandum,—
    - (i) the defendant does not intend to change his or her plea; and
    - (ii) the prosecutor does not intend to seek leave to amend or withdraw any charge; and
    - (iii) the prosecutor does not propose to add any new charge or charges against the defendant; and
    - (iv) the defendant does not request a sentence indication; and
    - (v) no party has given notice that it intends to make any other pre-trial application; and
    - (vi) no other matter is identified of a kind described in section 56(1)(e).

**58 Court may give directions about case management procedure**

- (1) If the court considers that it will facilitate resolution of the proceeding, or it is otherwise in the interests of justice, the court may—
  - (a) authorise or accept a departure from any of the requirements of sections 54 to 57: or
  - (b) give any other directions in relation to the management of the case.
- (2) A direction under subsection (1) may be given on the court's own motion or on the application of the prosecutor or the defendant.

**101 Pre-trial order relating to admissibility of evidence: jury trial**

- (1) This section applies if—
  - (a) the prosecutor or the defendant wishes to adduce any particular evidence at a jury trial; and
  - (b) he or she believes that the admissibility of that evidence may be challenged.
- (2) The prosecutor or the defendant may apply to the court for a pre-trial order to the effect that the evidence is admissible.
- (3) An application under subsection (2) must be made by the time prescribed by rules of court.
- (4) The court must give each party an opportunity to be heard in respect of the application before deciding whether or not to make the order.
- (5) The court may make an order under this section on any terms and subject to any conditions that the court thinks fit.
- (6) Nothing in this section nor in any order made under this section affects—
  - (a) the right of the prosecutor or the defendant to seek to adduce evidence that he or she claims is admissible during the trial; or
  - (b) the discretion of the court at the trial to allow or exclude any evidence in accordance with any rule of law.
- (7) If the evidence has been obtained under an order made, or a warrant issued, by the High Court, the application must be made to the High Court.

**107 Conduct of jury trial**

- (1) The prosecutor must make an opening statement that indicates to the jury the nature of the offences alleged and the evidence that he or she will call.
- (2) After the opening statement by the prosecutor and before any evidence is adduced, the defendant may make an opening statement for the purposes of identifying the issue or issues at the trial.
- (3) Unless the court directs otherwise, the prosecutor and the defendant must call evidence in the following sequence:
  - (a) the prosecutor may adduce the evidence in support of the prosecution case;
  - (b) the defendant may adduce any evidence that he or she wishes to present;
  - (c) subject to section 98 of the Evidence Act 2006, the prosecutor may adduce evidence in rebuttal of evidence given by or on behalf of the defendant.

- (4) Without limiting subsection (3), the court may give the defendant leave to call 1 or more witnesses (for example, an expert witness) immediately after the prosecutor has called a particular witness or witnesses.
- (5) At the end of the prosecution case, the defendant may make a further statement that indicates to the jury the nature of his or her case and the evidence that he or she will call.
- (6) When all the evidence (including any evidence given on cross-examination, re-examination, or in rebuttal) is concluded, the prosecutor may make a closing address.
- (7) After the closing address (if any) by the prosecutor, the defendant may make a closing address and the prosecutor has no right of reply in any case.

#### **199 Court must be cleared when complainant gives evidence in cases of sexual nature**

- (1) In any case of a sexual nature, no person may be present in the courtroom while the complainant gives oral evidence (whether in chief or under cross-examination or on re-examination), except for the following:
  - (a) the Judge and jury:
  - (b) the prosecutor:
  - (c) the defendant and any person who is for the time being acting as custodian of the defendant:
  - (d) any lawyer engaged in the proceedings:
  - (e) any officer of the court:
  - (f) the Police employee in charge of the case:
  - (g) any member of the media (as defined in section 198(2)):
  - (h) any person whose presence is requested by the complainant:
  - (i) any person expressly permitted by the Judge to be present.
- (2) Before the complainant starts to give evidence, the Judge must—
  - (a) ensure that no person other than those referred to in subsection (1) is present in the courtroom; and
  - (b) advise the complainant of the complainant's right to request the presence of any person under subsection (1)(h).
- (3) For the purposes of this section, case of a sexual nature means proceedings in which a person is charged with, or is to be sentenced for, any of the following offences:
  - (a) any offence against sections 128 to 142A of the Crimes Act 1961:
  - (b) any offence against section 144A of the Crimes Act 1961:
  - (c) any other offence against the person of a sexual nature:
  - (d) being a party to the commission of any offence referred to in paragraphs (a) to (c):
  - (e) conspiring with any person to commit any such offence.

**203 Automatic suppression of identity of complainant in specified sexual cases**

- (1) This section applies if a person is accused or convicted of an offence against any of sections 128 to 142A or 144A of the Crimes Act 1961.
- (2) The purpose of this section is to protect the complainant.
- (3) No person may publish the name, address, or occupation of the complainant, unless—
  - (a) the complainant is aged 18 years or older; and
  - (b) the court, by order, permits such publication.
- (4) The court must make an order referred to in subsection (3)(b) if—
  - (a) the complainant—
    - (i) is aged 18 years or older (whether or not he or she was aged 18 years or older when the offence was, or is alleged to have been, committed); and
    - (ii) applies to the court for such an order; and
  - (b) the court is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order; and
  - (c) in any case where publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence, no order or further order has been made under section 200 prohibiting publication of the identity of that person.
- (5) An order made under subsection (3)(b) ceases to have effect if—
  - (a) publication of the identity of the complainant may lead to the identification of the person who is charged with or convicted of the offence; and
  - (b) that person applies to a court for an order or further order under section 200 prohibiting publication of his or her identity; and
  - (c) the court makes the order or further order under section 200.

**217 Right of appeal by prosecutor or defendant against pre-trial decisions in jury trial case**

- (1) This section applies if a court makes a decision specified in subsection (2) in proceedings for—
  - (a) a category 3 offence after the defendant elected a jury trial; or
  - (b) a category 4 offence.
- (2) The defendant or the prosecutor may, with the leave of the first appeal court, appeal to that court against a decision that is one of the following:
  - (a) making or refusing to make an order under section 21 (to amend, divide, or amalgamate charges):
  - (b) making or refusing to make an order under section 101 (pre-trial order about admissibility of evidence):
  - (c) making or refusing to make an order under section 102 (that Judge-alone trial be held in case likely to be long and complex):
  - (d) making or refusing to make an order under section 103 (that Judge-alone trial be held in case involving intimidation of jurors):



- (e) amending or refusing to amend a charge under section 133:
- (f) making or refusing to make an order under section 138(4) (that defendant be tried separately on 1 or more charges):
- (g) making or refusing to make an order under section 151 (for a person to be retried on ground that acquittal tainted):
- (h) refusing to make an order under section 157 (to transfer proceeding to a court at another place):
- (i) granting or refusing to grant permission under section 44 of the Evidence Act 2006 (relating to the cross-examination of a complainant):
- (j) giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 (relating to the identity of a witness):
- (ja) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:
- (k) making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006.

## EVIDENCE ACT 2006

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### 4 Interpretation

(1) In this Act, unless the context otherwise requires,—

**child** means a person under the age of 18 years

**child complainant**, in relation to any proceeding, means a complainant who is a child when the proceeding commences

**child witness**, in relation to any proceeding, means a witness who is a child when the proceeding commences, and includes a child complainant but does not include a defendant who is a child

**communication assistance** means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who—

(a) does not have sufficient proficiency in the English language to—

(i) understand court proceedings conducted in English; or

(ii) give evidence in English; or

(b) has a communication disability

**expert** means a person who has specialised knowledge or skill based on training, study, or experience

**expert evidence** means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion

**previous statement** means a statement made by a witness at any time other than at the hearing at which the witness is giving evidence

**sexual case** means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,—

(a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or

(b) any other offence against the person of a sexual nature

### 7 Fundamental principle that relevant evidence admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is—

(a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

## 8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
  - (a) have an unfairly prejudicial effect on the proceeding; or
  - (b) needlessly prolong the proceeding.
- (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

## 9 Admission by agreement

- (1) In any proceeding, the Judge may,—
  - (a) with the written or oral agreement of all parties, admit evidence that is not otherwise admissible; and
  - (b) admit evidence offered in any form or way agreed by all parties.
- (2) In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.
- (3) In a criminal proceeding, the prosecution may admit any fact so as to dispense with proof of that fact.

## 16 Interpretation

- (1) In this subpart,—
 

**business—**

  - (a) means any business, profession, trade, manufacture, occupation, or calling of any kind; and
  - (b) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society

**business record—**

  - (a) means a document—
    - (i) that is made—
      - (A) to comply with a duty; or
      - (B) in the course of a business, and as a record or part of a record of that business; and
    - (ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but
  - (b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding

**circumstances**, in relation to a statement by a person who is not a witness, include—

- (a) the nature of the statement; and
- (b) the contents of the statement; and
- (c) the circumstances that relate to the making of the statement; and
- (d) any circumstances that relate to the veracity of the person; and
- (e) any circumstances that relate to the accuracy of the observation of the person

**duty** includes any duty imposed by law or arising under any contract, and any duty recognised in carrying on any business practice.

- (2) For the purposes of this subpart, a person is unavailable as a witness in a proceeding if the person—
  - (a) is dead; or
  - (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
  - (c) is unfit to be a witness because of age or physical or mental condition; or
  - (d) cannot with reasonable diligence be identified or found; or
  - (e) is not compellable to give evidence.
- (3) Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

## 17 Hearsay rule

A hearsay statement is not admissible except—

- (a) as provided by this subpart or by the provisions of any other Act; or
- (b) in cases where—
  - (i) this Act provides that this subpart does not apply; and
  - (ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

## 18 General admissibility of hearsay

- (1) A hearsay statement is admissible in any proceeding if—
  - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
  - (b) either—
    - (i) the maker of the statement is unavailable as a witness; or
    - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
- (2) This section is subject to sections 20 and 22.

**25 Admissibility of expert opinion evidence**

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
  - (a) an ultimate issue to be determined in a proceeding; or
  - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.
- (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that the person made to the expert about the person's state of mind, then—
  - (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
  - (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
- (5) Subsection (3) is subject to subsection (4).

**37 Veracity rules**

- (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
- (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
- (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
  - (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration);
  - (b) that the person has been convicted of 1 or more offences that indicate a propensity for a lack of veracity;
  - (c) any previous inconsistent statements made by the person;
  - (d) bias on the part of the person;
  - (e) a motive on the part of the person to be untruthful.

- (4) A party who calls a witness—
  - (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
  - (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
- (5) For the purposes of this Act, veracity means the disposition of a person to refrain from lying.

### **38 Evidence of defendant's veracity**

- (1) A defendant in a criminal proceeding may offer evidence about his or her veracity.
- (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
  - (a) the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
  - (b) the Judge permits the prosecution to do so.
- (3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:
  - (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence;
  - (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence;
  - (c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

### **40 Propensity rule**

- (1) In this section and sections 41 to 43, propensity evidence—
  - (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
  - (b) does not include evidence of an act or omission that is—
    - (i) 1 of the elements of the offence for which the person is being tried; or
    - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about—
  - (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
  - (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.

- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

#### **43 Propensity evidence offered by prosecution about defendants**

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
  - (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:
  - (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
  - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
  - (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—
  - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

**44 Evidence of sexual experience of complainants in sexual cases**

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
- (1A) Subsection (1) is subject to the requirements in section 44A.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
- (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).
- (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.
- (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

**44A Application to offer evidence or ask question about sexual experience of complainant in sexual cases**

- (1) An application under section 44(1) must comply with subsections (2) to (5) (as relevant) unless—
  - (a) every other party has waived those requirements; or
  - (b) the Judge dispenses with those requirements.
- (2) A party who proposes to offer evidence about the sexual experience of a complainant must make a written application and the application must include—
  - (a) the name of the person who will give the evidence; and
  - (b) the subject matter and scope of the evidence.
- (3) A party who proposes to ask any question about the sexual experience of a complainant must make a written application and the application must include—
  - (a) the name of the person who will be asked the question; and
  - (b) the question; and
  - (c) the scope of the questioning sought to flow from the initial question.



- (4) If any document is intended to be produced as evidence of the sexual experience of a complainant, the application required under subsection (2) must be accompanied by a copy of the document.
- (5) An application must be made and a copy of the application must be given to all other parties—
  - (a) as early as practicable before the case is to be tried so that all other parties are provided with a fair opportunity to respond to the evidence or question;
  - (b) unless a Judge otherwise permits under subsection (6), no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
- (6) The Judge may dispense with any of the requirements in subsections (2) to (5) if,—
  - (a) having regard to the nature of the evidence or question proposed to be offered or asked, no party is substantially prejudiced by the failure to comply with a requirement; and
  - (b) compliance was not reasonably practicable in the circumstances; and
  - (c) it is in the interests of justice to do so.

## 79 Support persons

- (1) A complainant, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.
- (1A) A child witness, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.
- (2) Any other witness, when giving evidence in any proceeding, may with the permission of the Judge, have 1 or more support persons near him or her to give support.
- (2A) Subsections (1), (1A), and (2) apply whether the witness or complainant gives evidence in an alternative way or in the ordinary way.
- (3) Despite subsections (1), (1A), and (2), the Judge may, in the interests of justice, direct that support may not be given to a complainant or a child witness or other witness by—
  - (a) any person; or
  - (b) a particular person.
- (4) A complainant or a child witness or other witness who is to have a support person near him or her while giving evidence must, unless the Judge orders otherwise, disclose to all parties as soon as practicable the name of each person who is to provide that support.
- (5) The Judge may give directions regulating the conduct of a person providing or receiving support under this section.

**80 Communication assistance**

- (1) A defendant in a criminal proceeding is entitled to communication assistance, in accordance with this section and any regulations made under this Act, to—
  - (a) enable the defendant to understand the proceeding; and
  - (b) give evidence if the defendant elects to do so.
- (2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge.
- (3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.
- (4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the Judge.
- (5) Any statement made in Court to a Judge or a witness by a person providing communication assistance must, if known by the person making that statement to be false and intended by that person to be misleading, be treated as perjury for the purposes of sections 108 and 109 of the Crimes Act 1961.

**85 Unacceptable questions**

- (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
  - (a) the age or maturity of the witness; and
  - (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
  - (c) the linguistic or cultural background or religious beliefs of the witness; and
  - (d) the nature of the proceeding; and
  - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

**87 Privacy as to witness's precise address**

- (1) In any proceeding, the precise particulars of a witness's address (for example, details of the street and number) may not, without the permission of the Judge, be—
  - (a) the subject of any question to a witness or included in any evidence given; or
  - (b) included in any statement or remark made by a witness, lawyer, officer of the court, or any other person.

- (2) The Judge must not grant permission under subsection (1) unless satisfied that the question to be put, the evidence to be given, or the statement or remark to be made, is of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice.
- (3) An application for permission under subsection (1) may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.
- (4) Nothing in subsection (1) applies in a criminal proceeding if it is necessary to disclose the particulars in the charge in order to ensure that the defendant is fully and fairly informed of the charge.

## **88 Restriction on disclosure of complainant's occupation in sexual cases**

- (1) In a sexual case, except with the permission of the Judge,—
  - (a) no question may be put to the complainant or any other witness, and no evidence may be given, concerning the complainant's occupation; and
  - (b) no statement or remark may be made in court by a witness, lawyer, officer of the court, or any other person involved in the proceeding concerning the complainant's occupation.
- (2) The Judge must not grant permission under subsection (1) unless satisfied that the question to be put, the evidence to be given, or the statement or remark to be made, is of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice.
- (3) An application for permission under subsection (1) may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.

## **92 Cross-examination duties**

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may—
  - (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
  - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
  - (c) exclude the contradictory evidence; or
  - (d) make any other order that the Judge considers just.

**95 Restrictions on cross-examination by parties in person**

- (1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning family violence or harassment, is not entitled to personally cross-examine—
  - (a) a complainant, or a party who has made allegations of family violence or harassment:
  - (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.
- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge's own initiative, order that a party to the proceeding must not personally cross-examine the witness.
- (3) An order under subsection (2) may be made on 1 or more of the following grounds:
  - (a) the age or maturity of the witness:
  - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
  - (c) the linguistic or cultural background or religious beliefs of the witness:
  - (d) the nature of the proceeding:
  - (e) the relationship of the witness to the unrepresented party:
  - (f) any other grounds likely to promote the purpose of the Act.
- (4) When considering whether or not to make an order under subsection (2), the Judge must have regard to—
  - (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
  - (b) the need to minimise the stress on the complainant or witness; and
  - (c) any other factor that is relevant to the just determination of the proceeding.
- (5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by—
  - (a) a lawyer engaged by the defendant; or
  - (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.
- (6) In respect of each such question, the Judge may—
  - (a) allow the question to be put to the witness; or
  - (b) require the question to be put to the witness in a form rephrased by the Judge; or
  - (c) refuse to allow the question to be put to the witness.
- (7) Subsection (1) overrides section 11 of the Criminal Procedure Act 2011.

**103 Directions about alternative ways of giving evidence**

- (1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.
- (2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.
- (3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
  - (a) the age or maturity of the witness:
  - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
  - (c) the trauma suffered by the witness:
  - (d) the witness's fear of intimidation:
  - (e) the linguistic or cultural background or religious beliefs of the witness:
  - (f) the nature of the proceeding:
  - (g) the nature of the evidence that the witness is expected to give:
  - (h) the relationship of the witness to any party to the proceeding:
  - (i) the absence or likely absence of the witness from New Zealand:
  - (j) any other ground likely to promote the purpose of the Act.
- (4) In giving directions under subsection (1), the Judge must have regard to—
  - (a) the need to ensure—
    - (i) the fairness of the proceeding; and
    - (ii) in a criminal proceeding, that there is a fair trial; and
  - (b) the views of the witness and—
    - (i) the need to minimise the stress on the witness; and
    - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
  - (c) any other factor that is relevant to the just determination of the proceeding.
- (5) Repealed.

**105 Alternative ways of giving evidence**

- (1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—
  - (a) the witness gives evidence—
    - (i) while in the courtroom but unable to see the defendant or some other specified person; or
    - (ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
    - (iii) by a video record made before the hearing of the proceeding:

- (b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:
  - (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:
  - (d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.
- (2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.
  - (3) The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103, despite a failure to observe strictly all of those terms.

## 106 Video record evidence

- (1) Without limiting section 105(1)(a)(iii), in a criminal proceeding, the video record evidence of a witness that is to be offered as an alternative way of giving evidence at the trial must, if a video record of that witness's evidence was filed as a formal statement under the Criminal Procedure Act 2011 or the witness gave oral evidence by way of a video record in accordance with an oral evidence order made under that Act, include that video record.
- (2) A video record offered by the prosecution as an alternative way of giving evidence must be recorded and dealt with in compliance with any regulations made under this Act.
- (3) A video record that is to be offered by the prosecution as an alternative way of giving evidence must be offered for viewing by a defendant or his or her lawyer before it is offered in evidence (including prior to any pre-trial consideration of admissibility), unless the Judge directs otherwise.
- (4) A copy of a video record that is to be offered by the prosecution as an alternative way of giving evidence must be given to a defendant's lawyer unless subsection (4A) applies, or, if subsection (4A) does not apply, the Judge directs otherwise.
- (4A) Subject to subsections (4B) and (4C), a defendant's lawyer is not entitled to be given a copy of a video record under subsection (4) of—
  - (a) any child complainant; or
  - (b) any witness (including an adult complainant) in a sexual case or a violent case.
- (4B) On the application of a defendant, a Judge may order that a copy of a video record or a part of a video record to which subsection (4A) applies be given to the defendant's lawyer before it is offered in evidence.

- (4C) When considering an application under subsection (4B), the Judge must have regard to—
- (a) whether the interests of justice require departure from the usual procedure under subsection (4A) in the particular case; and
  - (b) the nature of the evidence contained on the video record; and
  - (c) the ability of the defendant or his or her lawyer to view the video record under subsection (3) and to otherwise access the content of the video record, including by way of a transcript of the video record.
- (5) All parties must be given the opportunity to make submissions about the admissibility of all or any part of a video record that is to be offered as an alternative way of giving evidence.
- (6) If the defendant indicates he or she wishes to object to the admissibility of all or any part of a video record that is to be offered as an alternative way of giving evidence, that video record must be viewed by the Judge.
- (7) The Judge may order to be excised from a video record offered as evidence any material that, if the evidence were given in the ordinary way, would or could be excluded in accordance with this Act.
- (8) The Judge may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of any direction under this subpart and the terms of regulations referred to in subsection (2), despite a failure to observe strictly all of those terms.
- (9) To avoid doubt, subsections (3) to (4C) do not apply to any lawyer representing the Crown who may be given a copy of a video record (which may or may not be offered as an alternative way of giving evidence) at any time for the purpose of providing legal advice to the Police before a charging document is filed and for conducting the prosecution once proceedings have commenced.
- (10) In this section, a reference to a person being given a video record includes a reference to the person being given access to the video record, for example, being given access to an electronic copy of the video record through an Internet site.

## 121 Corroboration

- (1) It is not necessary in a criminal proceeding for the evidence on which the prosecution relies to be corroborated, except with respect to the offences of—
- (a) perjury (section 108 of the Crimes Act 1961); and
  - (b) false oaths (section 110 of the Crimes Act 1961); and
  - (c) false statements or declarations (section 111 of the Crimes Act 1961); and
  - (d) treason (section 73 of the Crimes Act 1961).

- (2) Subject to subsection (1) and section 122, if in a criminal proceeding there is a jury, it is not necessary for the Judge to—
  - (a) warn the jury that it is dangerous to act on uncorroborated evidence or to give a warning to the same or similar effect; or
  - (b) give a direction relating to the absence of corroboration.

## **122 Judicial directions about evidence which may be unreliable**

- (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
  - (a) whether to accept the evidence:
  - (b) the weight to be given to the evidence.
- (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
  - (a) hearsay evidence:
  - (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
  - (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
  - (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a police station, or another place of detention:
  - (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
- (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
  - (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
  - (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
- (4) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.
- (6) This section does not affect any other power of the Judge to warn or inform the jury.



**123 Judicial directions about certain ways of offering evidence**

- (1) The Judge must give the direction referred to in subsection (2) if, in a criminal proceeding tried with a jury,—
  - (a) a witness offers evidence in an alternative way under this Part; or
  - (b) the defendant is not permitted to personally cross-examine a witness; or
  - (c) a witness offers evidence in accordance with a witness anonymity order.
- (2) The direction required by subsection (1) is a direction to the jury that—
  - (a) the law makes special provision for the manner in which evidence is to be given, or questions are to be asked, in certain circumstances; and
  - (b) the jury must not draw any adverse inference against the defendant because of that manner of giving evidence or questioning.

**127 Delayed complaints or failure to complain in sexual cases**

- (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
- (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

## LAWYERS AND CONVEYANCERS ACT (LAWYERS: CONDUCT AND CLIENT CARE) RULES 2008

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### Chapter 12

#### Third parties

- 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

### Chapter 13

#### Lawyers as officers of court

- 13 The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

#### Duty of fidelity to court

- 13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

#### Protection of court processes

- 13.2 A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.
- 13.2.1 A lawyer must treat others involved in court processes with respect.

#### Presenting evidence and witnesses

- 13.10 A lawyer must not adduce evidence knowing it to be false.
- 13.10.1 If a witness (not being the lawyer's client) gives material evidence in support of the lawyer's client's case that the lawyer knows to be false, the lawyer must, in the absence of a retraction, refuse to examine the witness further on that matter. If the witness is the client of the lawyer, the lawyer must, in the absence of a retraction, cease to act for that client.
- 13.10.2 A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in the lawyer's possession.
- 13.10.3 A lawyer must not put questions regarding allegations against third parties to a witness when the lawyer knows that the witness does not have the necessary information or knowledge to answer questions in respect of those allegations, or where there is no justifiable foundation for the allegations.

- 13.10.4 A lawyer engaged in any proceeding does not have the sole right to call or discuss the case with a witness. A lawyer acting for one party may interview a witness or prospective witness at any stage prior to the hearing, whether or not the witness has been interviewed by the lawyer acting for the other party.
- 13.10.5 A lawyer must not treat a witness or potential witness in an overbearing or misleading way and if asked must inform a witness or potential witness of his or her right to decline to be interviewed.
- 13.10.6 A lawyer must not discourage a witness or potential witness from discussing the case with the lawyer acting for the other party or otherwise obstruct access to that witness or potential witness by the lawyer acting for the other party. A lawyer is, however, entitled to inform a witness or potential witness of the right to decline to be interviewed by the other party and of any relevant legal obligations.
- 13.10.7 A lawyer must not communicate with a witness during the course of cross-examination or re-examination of that witness or between the cross-examination and the re-examination, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party). This applies during adjournments of the hearing.
- 13.10.8 A lawyer must not suggest to a witness or potential witness, whether expressly or impliedly, that false or misleading evidence ought to be given or that evidence should be suppressed.

#### **Submissions on law**

- 13.11 The duty to the court includes a duty to put all relevant and significant law known to the lawyer before the court, whether this material supports the client's case or not. Subject to the procedure required by the practice direction contained in *Practice Note* [1968] NZLR 608, this duty continues until final judgment is given in the proceeding.

#### **Duties of prosecution lawyer**

- 13.12 A prosecuting lawyer must act fairly and impartially at all times and in doing this must—
  - (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
  - (b) present the prosecution case fully and fairly and with professional detachment; and
  - (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
  - (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.

**Duties of defence lawyer**

- 13.13** A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must—
- (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and
  - (b) put before the court any proper defence in accordance with his or her client's instructions—
- but must not mislead the court in any way.
- 13.13.1** When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.
- 13.13.2** If at any time before or during a defended trial a client makes a clear confession of guilt to his or her defence lawyer, the lawyer may continue to act only if the plea is changed to guilty or the lawyer—
- (a) does not put forward a case inconsistent with the confession; and
  - (b) continues to put the prosecution to proof and, if appropriate, asserts that the prosecution evidence is inadequate to justify a verdict of guilty; and
  - (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in the lawyer's professional opinion to be available.
- 13.13.3** Where a defence lawyer is told by his or her client that he or she did not commit the offence, or where a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.
- 13.13.4** A defence lawyer must not attribute to another person the offence with which his or her client is charged unless it is necessary for the conduct of the defence to do so and the allegation is justified by facts or circumstances arising out of the evidence in the case or reasonable inferences drawn from them.
- 13.13.5** A defence lawyer must not disclose a client's previous convictions without the client's authority.

## APPENDIX THREE

## TRIAL PROCESS REFORM IN ADULT RAPE CASES: SUMMARY FOR CONSULTATIVE WORKSHOPS

In Aotearoa New Zealand, and most other, if not all, common law jurisdictions, it is well accepted that despite many decades of reform aimed at improving the experience of adult complainants in sexual violence cases, there has been no significant change. In particular, the relevant legislative amendments to the Crimes Act 1961, as well as the introduction of the Evidence Act 2006 and the Criminal Procedure Act 2011, have not resulted in a change in how complainants talk about the impact of giving evidence:

*Just having to get up there and tell a room full of people in detail about what happened. ... It's not a nice thing to have to talk about – being forced to have sex in front of a whole lot of people. I thought I was going to be killed when I was raped. If I had, I would have been spared this – it was worse than the rape itself. If that's justice, I'd never report another rape (1983).<sup>1</sup>*

*It was horrible. I was exhausted; like every part of my body that night was so sore. And it was embarrassing and kind of degrading and disgusting and I felt kind of like I was the one on trial because you know the things they ask you and the things they imply and you're in a room full of people, 90 per cent of whom I don't know talking about intimate sexual stuff. Ninety percent of them are men, you know – most of them were men (2009).<sup>2</sup>*

*There's been no benefit to speaking up, and if it happened to me again I would just get on with my life. If it hadn't of been for this process, then I would have probably had a wee bit of time off work just to get over the stress and that's it. But I've actually never gone back to work since that happened. My health has hugely suffered and not because of the assault, but because of the process (2018).<sup>3</sup>*

The researchers in the 2018 report concluded, in relation to cross-examination:<sup>4</sup>

*Being cross-examined by defence lawyers was almost unanimously described as one of the most difficult aspects of the justice process, with many saying that they were completely unprepared for how traumatic this process was. This aspect ... appeared to be a key point of revictimisation for many participants.*

The reform-resistant nature of witness questioning in rape trials led me in 2015 to begin research focussing on complainant evidence in adult rape cases – in order to document current practice and propose further changes to law and practice.<sup>5</sup> The research team was eventually granted access, pursuant to the applicable rules of court, to 30 relevant jury trial cases, following an identification process involving searching legal databases and police records (through an Official Information Act request), and with the assistance of Crown Solicitors in order to confirm the cases fitted a particular fact pattern. The focus was on adult “acquaintance rape” cases (not those involving intimate partners), in which the defence was consent or belief in consent, as existing research established that complainants in these cases reported the most distress while giving evidence, as well as higher levels of dissatisfaction with the trial process.

The particular added value, and unique aspect, of this work is the ability to report on the stages in the trial process when the questioning is most difficult for complainants (through observation of heightened emotionality), as well as the extent to which there is intervention or objection at that time, or on other occasions. This is possible from the annotation of the Notes of Evidence with additional material from the accessed audio files, such as in-court conversations, pauses, breaks, disruption, admissibility discussions and judicial interaction.

During the course of this three-year research project, the Sexual Violence Court Pilot began. With the support of the Law Foundation, we undertook to compare 10 cases involving sexual violation by rape allegations, with the same criteria as the principal study, from the Pilot (in Auckland and Whāngārei), with the larger group of 30 cases (gathered from 10 Registries, and including High Court jury trials).

The findings, analysis and reform proposals from these two pieces of research will be published as an open access book in mid-December 2019. The material from all the cases has been anonymised and pseudonyms given to all the people involved.<sup>6</sup> The book will also describe the differences between the questioning of complainants in the Pilot cases, as compared to the cases from the principal study.

4 Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2018) at 79.

5 Supported by the Marsden Fund Council from Government funding, managed by Royal Society Te Apārangi (2015–2018); Human Ethics Approval (UC); and with the knowledge of the Judicial Research Committee and the Heads of Bench.

6 The research is not an exercise in singling out individuals – rather examining trends and general practices.

The purpose of the workshops is to discuss with other experts, those with experience of trial process in adult rape cases, the preliminary reform proposals – in order to gauge the level of support, as well as enable the development, change or discarding of any proposals that are undesirable or impractical.

The aim of the research, with a focus on the questioning process, was to document and critique the current trial process, as well as identify best practice, in terms of existing legal, procedural and ethical rules. As such, while the research seeks to establish why the process of giving evidence remains a significant site of re-trauma for complainants, possible because of the ability to listen for any heightened emotionality of the complainant, it also records how the various rules, implemented to address complainant concerns, are actually being used and implemented.

There remains a widespread view among those who participate in the criminal justice system (judges, prosecutors, defence counsel, police), as well as among those who observe it in action (complainants, support workers, researchers), that they would never advise a family member to report sexual violence. It seems to us, therefore, to remain a pressing task to address such an indictment. Our hope is that the discussion in the workshops will reflect a shared desire to achieve an improved trial process, one that of itself is just and delivers fairness, regardless of the outcome. The aim of the research, and the proposed reform, is not to increase conviction rates for rape but rather to respond to the challenges of upholding the rights of complainants *and* the rights of defendants in the context of an adversarial trial process. We believe that this in part may be accomplished by a trauma-informed approach to law and practice.

What follows is a series of draft recommendations, accompanied by some context and explanation. The proposals arise out of our observations from the 40 trials – much more detail and many examples will be included in the book. It is important, however, to first note the scope and limitations of this research, and consequently the draft recommendations.

First, the only material from each case that we asked for, and were granted access to, was the complainant's evidence (the Notes of Evidence and audio recording of her evidence); admissibility rulings; closing arguments; and, the judge's summing-up. We did not have access to the evidential video interview (EVI) (or video recorded interview) of the complainant (as our focus was on questioning at trial), nor to the evidence, or pre-trial statement, of the defendant, if any. We relied on the closings and summing-up, as needed, to comment on the relevance of some pieces of evidence – which has its own limitations.

Secondly, these cases involved, for the most part,<sup>7</sup> a sole female complainant and a sole adult male defendant, and all of the cases involved a complainant aged 17 or over at the time of the alleged offending and at least one charge of sexual violation by rape. From this information, it will be clear that the research does not offer insights into the experience of

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7 In the two cases in which there were two complainants (this was not known until we looked at the file), we only analysed the evidence and information in relation to one of the complainants.

male complainants, nor those of Māori,<sup>8</sup> nor those of defendants who give evidence (as we did not seek access to their evidence). Nor are we in a position to say very much about the admissibility or use of expert evidence, or that gathered from a forensic medical examination.

Thirdly, the research examines the adversarial trial process as it exists within the current criminal justice system. While the research findings may provide support for the development of alternative processes to respond to allegations of sexual offending, we make no comment on such alternatives.

Finally, although we have views about the Government's current proposals in this area,<sup>9</sup> we consider that as these matters will be debated as part of the upcoming legislative process, we do not see the need to allocate time to these proposals as part of the workshops – with a couple of exceptions. We also have not included in the recommendations those of a highly technical nature. It is our plan to undertake targeted consultation on those matters.

For ease of discussion, we have grouped together the recommendations according to whom they will affect, in terms of changes to their practice. We begin with those of wider significance or application (“General recommendations”). Many may well require a legislative response, and so the Government will first need to implement those recommendations. We have emphasised in shaded boxes the recommendations we would like to prioritise for consideration at the workshops, but we also ask the participants to nominate any others they would like discussed.

### General observations

Much other local and international research has documented aspects of the trial process in rape cases by analysing trial transcripts or information from publicly available appellate decisions or through court observation work or interviews with complainants and other trial participants. In order to provide some contextual background to the recommendations we make the following observations based on our analysis of the 40 cases we have analysed:

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- 8 In most of the 40 cases accessed the ethnicity or cultural background of the complainants was not known. However, case based research which examines the particular impact of the criminal justice system on Māori rape complainants remains embarrassingly overdue. It is hoped that the dissemination of the methodology and findings of this tauīwi-led project will encourage funders to adequately support initiatives that employ kaupapa Māori, in order to develop culturally responsive reform of law and practice. See further *He Waka Roimata: Transforming Our Criminal Justice System* (2019) at 26  
<https://www.safeandeffectivejustice.govt.nz/about-this-work/te-uepu-report/>
- 9 <https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf>  
 The proposals in part respond to the Law Commission's report on the second review of the Evidence Act 2006: Report 142, 2019.



- (i) Inadmissible evidence is regularly admitted (that which is irrelevant or inadmissible under ss 44 and 88 in particular, although this occurred less often in the Pilot cases);
- (ii) There are relatively few examples of judges or the Crown intervening or objecting to inappropriate questions asked by, or inadmissible evidence offered by, the defendant (although there was noticeably more judicial reliance on s 85 in the Pilot);
- (iii) The times at which the complainant appeared most distressed during questioning (indicated by long pauses; failure to answer; crying; asking for a break; struggling to give a complete answer or where the judge suggested an unscheduled break following one of these occurrences) were when:
  - (a) There were challenges to memory and inconsistencies based on a failure to recall minute details of the event or peripheral matters;
  - (b) There was a need for the complainant to talk about particularly detailed or unpleasant aspects of the alleged rape itself;
  - (c) It was suggested to the complainant that she was responsible for the rape (“what did you expect would happen?”);
  - (d) Complainants were asked upsetting or “disgusting” (to use their words) questions about their behaviour at the time (putting to her that she was wearing no underwear or that she asked the defendant to spit on his fingers);
  - (e) It was put to the complainant that she was lying about the events;
  - (f) There were lengthy and repetitive questions by defence counsel categorised as necessary to put the defendant’s case;
  - (g) There was reliance on one or more rape myths as the basis of questions – such as a focus on her delay going to the police; her failure to struggle or call out; the type of clothes she was wearing at the time or on other occasions; contact with the defendant after the alleged rape; lack of injury.
- (iv) There was no reliance on, or admission of, counter-intuitive evidence, beyond the use of s 127, in any of the 40 cases, although often submissions were made that could have helpfully been responded to by such evidence (in particular concerning how a victim of rape would behave at the time or immediately afterwards);
- (v) Judicial directions (and question trails) on consent, belief in consent and the relevant aspects of s 128A (especially directions on capacity to consent when a person is intoxicated) were inconsistent across the 40 cases, although many had similar fact patterns and the same issues to be determined arose in all of them;
- (vi) Communication with the complainant in the courtroom and prior to and during her giving evidence was mixed in terms of the extent to which she was acknowledged (by use of her name or by thanking her for her evidence), spoken to respectfully, given ongoing information about the process and displaying understanding of her language use and expression preferences (greeting and thanking the complainant by the judge was more consistent in the Pilot cases);

- (vii) Complainants were sometimes asked to explain to the judge, counsel and the jury aspects of social media platforms and technology during their evidence;
- (viii) Complainants whose EVI was admitted were also expected to answer many more questions during examination-in-chief;
- (ix) Judicial directions, in terms of both content and timing, regarding the use of alternative ways and other special measures (such as support persons and clearing the court) were inconsistent across the cases;
- (x) Section 44A (the notice requirement for the offering of sexual history evidence) was often waived or dispensed with by consent so that the admissibility decision was made during the trial with implications for appeal rights;
- (xi) The scope of s 44(1) was interpreted inconsistently across the cases (for example, some judges believed evidence that the complainant was in a sexual relationship with another person at the time of the alleged rape fell within the definition of sexual experience, while others did not);
- (xii) The heightened relevance test in s 44(3) was often viewed as being satisfied on the basis that the evidence had relevance to an assessment of the complainant's credibility, which is inconsistent with the policy behind the provision;
- (xiii) The veracity rule (regarding the admissibility of a complainant's convictions) was incorrectly applied in the cases in which conviction evidence was offered;
- (xiv) The acquittal rates for the alleged rape of an intoxicated woman seem particularly high (at least within this sample: 13 out of 18 cases);
- (xv) Closing arguments contained high levels of reinforcement of rape mythology (the ways real victims will behave, what they will wear, when they will shower etc.), as well as references to the claim that rape allegations are easy to make and hard to disprove and strong encouragement that the jury should look for supporting evidence before convicting. Judges rarely responded to such reliance or claims.

The reason for referencing, and focussing on, the reinforcement of rape myth, and/or the "real rape" schema as part of this research project is helpfully summarised by Elaine Craig:<sup>10</sup>

*The prosecution of sexual assault reflects a judicial process with a long and deep-seated history of discriminatory beliefs about women, and a reality that in adjudicating allegations of sexual violation (which primarily means credibility assessments), finders of fact are almost always asked to make decisions under conditions of uncertainty. This makes schematic thinking both particularly likely and uniquely problematic in sexual assault trials. When a lawyer suggests to a complainant that the reason she did not tell anyone right away is because*

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<sup>10</sup> Elaine Craig *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's University Press, 2018) at 101.

*she is fabricating the allegation to cover up consensual sex she now regrets, or points to a lack of physical injury as evidence of consent, or intentionally introduces a trial judge to inadmissible evidence demonstrating a complainant's so-called promiscuity, he or she deploys a powerful heuristic that risks triggering reasoning that is both difficult to displace and wrong at law. The persuasiveness and intransigence of these entrenched stories about sexual violence divert reasoning from a process of legal findings based on relevant evidence. In other words, these stereotypes about rape jeopardize the possibility of a fair trial.*

## General recommendations

### G1 Pre-trial recording of all of the complainant's evidence

We agree that there are currently significant challenges regarding the fairness of pre-trial recording of cross-examination if undertaken close in time to the reporting of the alleged offence.<sup>11</sup> We consider that the likelihood in most cases of further questioning at trial, both examination in chief and cross-examination, undermines one of the primary purposes of allowing earlier resolution from a complainant's perspective.

While early cross-examination may be also preferable in terms of recollection, we recommend that recording of cross-examination should occur close in time to the trial, as is the case in other jurisdictions. This process could be used in combination with fast tracking of sexual cases (as in the Pilot) and agreed "ground-rules" (see NZLC R142 at 10.43).

We consider that pre-recording all of the complainant's evidence close to the trial (including evidence in chief and re-examination) has the following benefits:

- (i) An evidential interview can be still be used for its primary purpose as an evidence gathering tool, rather than in place of evidence in chief. Currently there are concerns about length, discursiveness and admissibility, and our research indicates that playing the EVI at trial does not obviate the need for (sometimes very lengthy) examination in chief. Complainants in this research also struggled at times to respond to questions based on the chronology of events because their EVI was not structured around a timeline. It also appeared to us that complainants whose first experience of answering questions at the trial was during cross-examination were more impacted than those who had given viva voce evidence in chief.
- (ii) Our research demonstrates that judges rarely intervene to control questioning of complainants, either in reliance on s 85 or on the basis of relevance (but are

<sup>11</sup> [https://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0005/136733/I-MoJ-SV-reforms-re-Law-Commission-recommendations-11.10.18.pdf](https://www.lawsociety.org.nz/_data/assets/pdf_file/0005/136733/I-MoJ-SV-reforms-re-Law-Commission-recommendations-11.10.18.pdf)

more willing to do so when an interpreter is involved or the complainant is also vulnerable for reasons such as age or cognitive impairment). Defence counsel are permitted to rely on their obligation under s 92 and claims that the proposed evidence has relevance to credibility, with the consequence that complainants are required to answer repetitive, complicated, sometimes disrespectful or belittling questions, as well as those that rely on the recall of minutiae. It seems likely, based on other research, that judges are reluctant to intervene so as to prevent appearing that they are partisan and to avoid a successful appeal and thus a retrial. Pre-recording a complainant's evidence will allow editing, and therefore potentially more interventions, given they will not occur in the presence of the jury.

- (iii) Pre-recording will also allow management of admissibility or process issues (without impacting on the jury) as well as breaks for the complainant and the ability for support people to offer physical comfort. Greeting by the judge, or explanation of procedures, can also occur on the basis that anything that is potentially prejudicial can be edited out in advance of the recording use at trial. In the event of a re-trial, it may be possible to use the same recording, edited or added to, depending on the reason for the successful appeal.

**G2** All judges, including those on the appellate courts, participate in judicial education and development programmes that include:

- (i) Best practice and trauma-informed methods for communicating with and assisting complainants of sexual violence while they are giving evidence. Consideration should be given to the development of good practice examples, and to extending the innovative practices being used in the Pilot;
- (ii) An education module aiding familiarity with social media and the platforms and technologies it uses so as to reduce the difficulties that lack of understanding of digital technology is causing for complainants in the courtroom;
- (iii) Information about generally accepted or usual social interactions, dating norms and intimacy expectations of people aged 16–26, including their use of social media;
- (iv) Education on the substantive law of rape and the relationship between gender stereotypes and the legal process in the context of sexual cases;
- (v) Content about the social context of sexual violence, including: the gendered nature of sexual violence; the connection between common myths and stereotypes about rape and victim blaming; and, practical content that encourages judges to reflect upon their own stereotypical assumptions about gender, sexuality, and sexual violence (and the impact of those assumptions on their decision-making and trial practice);
- (vi) Training in cross-cultural communication, plain language questioning and the avoidance of asking questions that reinforce rape myth.

**G3** The matters set out in Recommendation G2 should also form part of the Government’s recommended “specialist training” programme for prosecutors and defence counsel.

**G4** We consider that the training for those professionals who assist complainants through the pre-trial and trial process should include representation or input from those who defend or prosecute sexual cases to ensure that complainants are given accurate and current advice about their role, and the role of a support person. For example: there is no “no touch rule” for support people, but there are limits to physical contact based on the risk of adverse inferences and the layout constraints of the courtroom;<sup>12</sup> complainants should be advised they can wait and think before answering questions or say if they do not understand a question; and, that it is permissible for complainants to show emotion (and to ask for breaks), but impermissible to be obstructive or unfairly criticise defence counsel.

**G5** We support the expansion of specialist community psychosocial support services to provide complainants of sexual violence with psychological and practical preparation for going to court. Consideration should be given as to how those services and prosecutors can cooperate to ensure that complainants receive adequate information about going to court and the questioning process as well as the psychological support to prepare for being a witness.

**G6** Background medical information or patient history gathered during a forensic examination for the purposes of treating a complainant, as opposed to the findings of the examination, should not be routinely given to the police and must be the subject of a non-party disclosure application in order for such information to be disclosed to the Crown or the defence.

**G7 Introduction of new offence**

We recommend the introduction of a new offence of having sexual connection with a person who the defendant knows, or ought to know, is under the influence of drugs or alcohol to the extent that their ability to understand what they are consenting to, and with whom, is affected. We suggest the offence is accompanied by a description of what indicia of intoxication would objectively indicate lack of capacity (such as stumbling, slurred speech, vomiting, desire to lie down) and would have a penalty closer to indecent assault than to sexual violation. It may be an alternative charge (see Recommendation P1).

<sup>12</sup> Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019) at 47.

**G8** We recommend that the usual pre-trial practice should be that the complainant watches her EVI a day or two before trial and is not required to watch it at trial. This will also provide certainty as to when she is required to be at court (10 am the second day of the trial). If an EVI was recorded but will not be offered as evidence, the complainant should view a copy of the transcript of the EVI in advance, in order to make sure she can read it, knows what it looks like, and can navigate its contents – in the event that it will be used at trial for the purposes of refreshing memory or cross-examination on inconsistencies.

**G9** We recommend the increased use of s 9 agreed statements to cover matters not at issue in trial – including the type of penetration (which will reduce the need for the complainant to give evidence of this detail), and that closer attention is given to the inclusion of irrelevant or unfairly prejudicial material in such statements.

**G10** Work on improved court facilities for complainants (and all witnesses) should include adding the technology to enable amplification a witness's voice (perhaps a collar microphone). We note that complainants are often admonished for failure to “speak up”, but it is the witness in the courtroom who is most unfamiliar with speaking in that environment and lacking understanding of the importance of voice projection as well as the ability to do so while giving difficult evidence.

**G11** Counsel should be more willing to intervene in questioning by the judge that is contrary to the scope of s 85 or amounts to a descent into the arena (see also 12.2 of the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*).

**G12** The proposed “counter-intuitive” directions (NZLC R142) should include information on:

- (i) the extent to which people who are sexually assaulted are unable to physically resist the attack, due to the physiological and psychological impacts of the event;
- (ii) the extent to which victims of sexual offending may (or may not) appear distressed after the alleged offending or when giving evidence, and that distress may manifest in varying ways, including in the form of anger or hostility;
- (iii) the fact that in the majority of cases no genital injuries occur; and,
- (iv) the fact that what victims of sexual violence were wearing at the time of the offending is not a predictor of sexual violence.

**G13** We recommend additions to the content of s 127 of the Evidence Act 2006 to allow the judge to explain that a complainant may delay complaining to a **particular person** they might be expected to complain to (especially the police), and that they may make a complaint incrementally and not use particular words (e.g. they might not initially refer to the alleged offending as rape). See also Recommendation G16.

- G14** We recommend the development of directions on memory, including the impact of intoxication on reliability of recall.
- G15** Legislative consideration should be given to the use of “repetition warnings”. In our view, repetition warnings should not be required as long as s 35(2)(a) is properly applied. If the previous consistent statement is sufficiently probative to respond to the challenge to the complainant’s veracity or accuracy, then the jury should be entrusted to give the evidence appropriate weight. If repetition warnings are retained, we recommend that they be used in a way to make it clear to juries that both lies, and the truth, may be the subject of repeated complaint or discussion.
- G16** We recommend the enactment in the Evidence Regulations of a direction giving guidance as to assessing inconsistencies.<sup>13</sup>
- G17** The *actus reus* aspect of s 128 (lack of complainant consent) requires legislative attention. We suggest that as part of the Government’s proposed long-term work plan, if not earlier, the desirability of the codification of the definition of consent (including a requirement of an “affirmative communicative model”) is considered, as well as whether the requirement of lack of consent could be replaced with another inquiry.

13 For example s 54D of the Jury Directions Act 2015 (Vic):

**Direction on difference in complainant’s account**

- (1) If, after hearing submissions from the prosecution and defence counsel (or, if the accused is unrepresented, the accused), the trial judge considers that there is evidence in the trial that suggests a difference in the complainant’s account of the offence charged that is relevant to the complainant’s credibility or reliability, the trial judge must direct the jury in accordance with subsection (2).
- (2) In giving a direction referred to in subsection (1), the trial judge must inform the jury that—
  - (a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and
  - (b) differences in a complainant’s account may be relevant to the jury’s assessment of the complainant’s credibility and reliability; and
  - (c) experience shows that—
    - (i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and
    - (ii) trauma may affect different people differently, including by affecting how they recall events; and
    - (iii) it is common for there to be differences in accounts of a sexual offence; and

**Example**

People may describe a sexual offence differently at different times, to different people or in different contexts.

  - (iv) both truthful and untruthful accounts of a sexual offence may contain differences; and- (d) it is up to the jury to decide—
  - (i) whether or not any differences in the complainant’s account are important in assessing the complainant’s credibility and reliability; and
  - (ii) whether the jury believes all, some or none of the complainant’s evidence.
- (3) The trial judge may repeat a direction under this section at any time in the trial.
- (4) This section does not limit what the trial judge may include in any other direction to the jury in relation to evidence given by an expert witness.

**G18** Legislative reform is required to provide guidance on what might amount to the “something more” than a lack of protest or physical resistance (s 128A(1)) in order for this to amount to consent, or to provide reasonable grounds for a belief in consent.

**G19** We recommend the development of directions on how to assess lack of capacity to consent due to intoxication (see also Recommendation G7). Jury directions regarding the impact of intoxication on consent should refer to the content of s 128A(4) as well as to the requirement to focus on the complainant’s ability to give consent at the relevant time, not just the impact of intoxication on inhibitions. That is, the focus should clearly remain on: “What is essential for valid consent is that the complainant had an understanding of her situation and was capable of making up her own mind.”

**G20** Legislative guidance is required regarding the impact of the matters listed in ss 128A(1) – (7) on the *mens rea* requirement in s 128. That is, in which circumstances, if a defendant is aware of the existence of any of the matters listed, should that preclude an argument that the defendant believed on reasonable grounds that the complainant was consenting.

**G21** Consideration, including public consultation on the matter, given the level of debate,<sup>14</sup> should be given as to whether legislative guidance or jury directions should contain examples of what should or should not amount to reasonable grounds.

### Recommendations with particular implications for prosecutorial practice

**P1** We recommend that the Crown consider more often laying alternative charges in cases where consent is an issue (such as s 134 (sexual conduct with a person under the age of 16) and s 128 (sexual violation); the proposed new offence in Recommendation G7 and s 128.

**P2** Consider amending the *Solicitor-General’s Guidelines for Prosecuting Sexual Violence* regarding pre-trial meetings with complainants to include reference to the need to engage in rapport building so that the trial prosecutor can become more familiar with the particular complainant’s personal circumstances and communication style, including their familiarity with a sufficient range of terms to describe the sexual acts alleged.

<sup>14</sup> <https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/6dhd38-Criminal-Justice-Victims-workshop-playback-report.pdf> at 35.



- P3** Prosecutors need to develop other ways to settle or humanise the complainant rather than by reference to inadmissible or prejudicial evidence (such as her occupation, her age, the number of children she has, the occupation of her partner, her school qualifications).
- P4** We are of the view that the Crown should more often consider offering evidence to bolster complainant's credibility (such as evidence of the defendant's previous behaviour to explain her behaviour at the time of or after the alleged rape or evidence of lack of previous sexual behaviour of the kind she allegedly consented to). This evidence should be admissible to respond to attacks as to what kind of person the complainant is, offered to go to the assessment of her credibility.
- P5** We consider that prosecutors should object more often with regard to both improper questions and the admissibility of evidence. The Crown should also consider asking the judge to address in summing up any inappropriate reliance on rape myth in closing arguments.

#### Recommendations with particular implications for defence counsel

- D1** The specialist training programme recommended by the Government for counsel (see further Recommendation G3), should include modelling of cross-examination techniques that reduce reliance on repetition, un-flagged changes of topic, confusing, time-pressured, or complex and compound questions and memory-testing questions concerning minute levels of detail about peripheral matters – as well as discussion of the scope of legitimate questioning required to meet the s 92 duty.<sup>15</sup>
- D2** We consider there is a need for discussion within the defence bar concerning the development of a shared ethical view of the approach to questioning adult rape complainants and closing submissions in rape cases – for example, the implications of aspects of rr 12 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. We consider that strategies aimed at humiliating complainants or in reliance on rape myth that have been addressed by legislation (for example, directions on delay in s 127 of the Evidence Act and what does not amount to consent in s 128A of the Crimes Act) are of concern, and are unnecessary in order to conduct an effective defence.<sup>16</sup>

15 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019): “We can learn a much better way as defence advocates on dealing and tightening up and being better at what we do. We need workshops and try and help people cross-examine in a much more effective and efficient way. *We’ve got to come away from how it used to be 30 years ago and upskill and have consistency* (Defence counsel)” at 75 (emphasis added); “I think as a defence bar we need to do some further work in relation to approach. Maybe we need to talk to the Law Society about running specific seminars on cross-examination of complainants (Defence counsel)”, at 87.

16 “A good start as to what should happen next would be the deconstruction of old narratives and familiar tropes. We need to embrace a meaningful ‘talk-fest’... I encourage more ... truth, authenticity, bravery and a willingness to open up and let go of existing power structures”: Nicola Manning “A defence lawyer at the Criminal Justice Summit” (2018) 922 LawTalk 62 at 63.

- D3** We believe there is a need for a wider consideration of what amounts to a good faith basis for a question. While it has historically been the case that a “cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition”,<sup>17</sup> we see value in discussing the meaning of what are generally agreed reasonable inferences in contemporary society (including what amounts to “reasonable instructions”: see r 13.10.2).
- D4** Defence counsel should not suggest that the complainant is responsible for the offending, either in questioning or in closing (see also Recommendation 22 in NZLC R142).

### Recommendations with particular implications for judicial practice

- J1** Section 44A (the notice requirement) should be enforced (subject, as in the Pilot, to a specific inquiry as part of the case management process and drafting of joint memorandum) and admissibility decisions decided and resolved pre-trial, except in exceptional and unforeseeable circumstances. This allows for well-prepared submissions and pre-trial appeals, as well as clarity for the complainant as to whether she will be asked questions about her sexual behaviour when giving evidence.
- J2** Given the discrepancies in approach to the admission of evidence of the complainant’s sexual experience, and the difficulty in accessing decisions at first instance, we recommend that all decisions made under s 44 (pre-trial or during trial) are transcribed and made available after the trial on searchable legal databases.<sup>18</sup>
- J3** While acknowledging the challenges of intervening during questioning, we consider that judges must more strictly enforce the rules of evidence and ethical constraints (with the support of clearer appellate and/or legislative guidance).
- J4** Judges should avoid asking complainants (or any witness in a sexual case) questions that have limited probative value and risk the reinforcing of rape myth and/or the “real rape” schema.
- J5** Judges should respond to submissions which appear to rely on contestable beliefs about the behaviour of victims of sexual offending (which may form part of a “counter-intuitive” direction), and also to unsubstantiated claims about the level of false complaints or the ease of making a complaint of rape.<sup>19</sup>
- J6** Judges should be clearer in summing up about what the jury need not spend time on in terms of the facts and submissions (including referencing any s 9 agreed facts).

17 *Lyttle v R* (2004) 235 DLR (4th) 244 (SCC) at 48.

18 See also Recommendation 8.13 in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 23.

19 See also *E (CA113/2009) v R (No2)* 2010 NZCA 280 at 53.

- J7** We suggest that judges consider summarising the Crown and defence case at the same time they discuss the applicable law, rather than providing a fulsome summary at the end of the summing up which risks repeating and reinforcing contestable assumptions.
- J8** If evidence of the complainant's sexual behaviour is admissible solely as relevant to an assessment of her credibility or veracity, the jury should be directed to disregard the evidence when making a decision as to whether the defendant had reasonable grounds to believe that the complainant was consenting.<sup>20</sup>
- J9** Judges, in directing the jury, should respond to submissions that indicate the desirability of looking for supporting evidence by reminding the jury that they may convict on the uncorroborated evidence of the complainant.

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<sup>20</sup> *Pegler v R* 2015 NZCA 260 at 24.

## APPENDIX FOUR

## WORKSHOP ATTENDEES

*Auckland Workshop – 28 August 2019*

(Name, affiliation or role)

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- ▶ *Steve Bonnar*, New Zealand Law Society
  - ▶ *Charlotte Brook*, Crown Law Office
  - ▶ *Clare Cheesman*, Ministry of Justice
  - ▶ *Annabel Cresswell*, Criminal Bar Association
  - ▶ *Fiona Culliney*, Meredith Connell
  - ▶ *Elise Daly Sadgrove*, Ministry of Justice
  - ▶ *Jeremy Finn*, University of Canterbury
  - ▶ *Nicola Gavey*, University of Auckland
  - ▶ *Megan Goldie*, New Zealand Police
  - ▶ *Lynn Hughes*, Criminal Bar Association
  - ▶ *Pam Maha*, Sexual Violence Court Advisor, Ministry of Justice
  - ▶ *Kathryn McPhillips*, HELP Auckland
  - ▶ *Brenda Midson*, Waikato University, Te Piringa Faculty of Law
  - ▶ *Vanessa Munro*, University of Warwick
  - ▶ *Andrea Nahu*, Sexual Violence Court Advisor, Ministry of Justice
  - ▶ *Bernadette O'Connor*, MWIS Lawyers, Whāngārei
  - ▶ *Scott Optican*, University of Auckland
  - ▶ *Warren Pyke*, Barrister
  - ▶ *Julia Quilter*, University of Wollongong
  - ▶ *Lucie Scott*, Criminal Bar Association
  - ▶ *Adam Simperingham*, Criminal Bar Association
  - ▶ *Henry Steele*, Meredith Connell
  - ▶ *David Stevens*, Kayes Fletcher Walker
  - ▶ *Kelly-Ann Stoikoff*, Criminal Bar Association
  - ▶ *Joy Te Wiata*, Korowai Tumanako

- ▶ *Debbi Tohill*, Rape Prevention Education
- ▶ *Julia Tolmie*, University of Auckland
- ▶ *Yvonne Urry*, Sexual Assault Court Support Provider
- ▶ *Camille Wrightson*, High Court Judges' Clerk

### **Wellington Workshop – 30 August 2019**

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- ▶ *Rachael Adams*, Criminal Bar Association
- ▶ *Len Andersen QC*, Criminal Bar Association
- ▶ *Claire Baylis*, Victoria University of Wellington
- ▶ *Tania Billingsley*, HELP Wellington
- ▶ *Stephanie Bishop*, Crown Prosecutor
- ▶ *Shelley Brown*, HELP Wellington
- ▶ *Billie-Jean Cassidy*, Te Puna Oranga – Kaupapa Māori
- ▶ *Sarah Croskery-Hewitt*, Community Law Wellington and Hutt Valley
- ▶ *Fionnghuala Cuncannon*, Meredith Connell
- ▶ *Clare Healy*, MEDSAC
- ▶ *Catherine Helm*, New Zealand Law Commission
- ▶ *Susanna Kent*, MEDSAC
- ▶ *Fiona Guy Kidd QC*, Criminal Barrister
- ▶ *Dale La Hood*, Crown Prosecutor
- ▶ *Nicolette Levy QC*, Appellate Defence Lawyer
- ▶ *Marcia Marriott*, Te Puna Oranga – Kaupapa Māori
- ▶ *Vanessa Munro*, University of Warwick
- ▶ *Louise Nicholas*, National Sexual Violence Survivor Advocate
- ▶ *Jimmy Patea*, New Zealand Police
- ▶ *Julia Quilter*, University of Wollongong
- ▶ *Leigh Spencer*, Sexual Violence Court Advisor, Ministry of Justice
- ▶ *Sarah Tapper*, Chief Victim Advisor's Office, Ministry of Justice
- ▶ *Anthony Tebbutt*, New Zealand Police
- ▶ *Yvette Tinsley*, Victoria University of Wellington
- ▶ *Mereana White*, Institute of Judicial Studies
- ▶ *Chris Wilkinson-Smith*, Crown Prosecutor
- ▶ *Steve Zindel*, Defence Lawyer

